The Dangers of *Zivotofsky II*: A Blueprint for Category III Action in National Security and War Powers

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Introduction

In its 2014 term, the U.S. Supreme Court issued a historic decision that could fundamentally alter the separation of powers: *Zivotofsky v. Kerry* (*Zivotosfky II*).[1] For the first time in its history, the Court upheld executive branch action in the face of congressional prohibition, action that falls within the so-called Category Three of executive power defined by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*.[2] While it is too early to know for certain what kind of impact this case will have, its unprecedented nature gives it the potential to have far-reaching and perhaps unexpected effects. Such effects are especially likely in the fields of national security and war powers—areas of historic conflict between the political branches. While this may be a captivating prospect for an administration eager to implement its policies, the consequences for the separation of powers should counsel against such executive overreach. To protect individual liberty, "[a]mbition must be made to counteract ambition."[3] In other words, each branch must have the tools to effectively check the actions of the other.

This paper examines the effects of *Zivotofsky II* on executive national security and war powers. The first part provides a general overview of separation of powers jurisprudence and outlines the background constitutional law upon which *Zivotofsky II* builds. The second part summarizes and analyzes the *Zivotofsky II* decision itself. The third section looks at how *Zivotofsky II* may replace *United States v. Curtiss-Wright*,[4] a 1936 Supreme Court decision whose dicta suggested that the executive branch possessed extraordinarily broad inherent powers in foreign relations. The fourth part discusses the unique features of *Zivotofsky II* and why they combine to create dangerous precedent in the hands of a determined administration. The fifth part explores how the executive branch may use the decision in the future. The

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

[2] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–39 (1952) (Jackson, J., concurring).

[3] The Federalist No. 51, at 322 (James Madison).

[4] *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936).

sixth section expands on this discussion by giving specific examples of how the executive branch could use *Zivotofsky II* and the implications of each. The last section delves into why the executive branch should resist the temptation to use the decision as an expansion of executive power and what could be done to defend against its use.

I. General Constitutional Law Principles

As this article deals with the separation of powers, it makes sense to begin with Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, the predominant framework used to analyze such disputes.[5] The opinion divides all instances of executive action into three categories. A Category One situation is one in which the executive branch acts in accordance with congressional law; such action is considered lawful so long as it does not otherwise violate the Constitution.[6] In Category Two, the executive branch acts in the face of congressional silence and is lawfully permitted to do so as long as it is acting pursuant to an independent constitutional power.[7] Lastly, Category Three occurs where the executive branch proceeds in defiance of legislation.[8] The executive branch may only act in this manner if it has an *exclusive* constitutional power that Congress has no grounds to disturb.[9] Justice Jackson believed that the Court should employ a "severe test" in Category Three, as the "equilibrium established by our constitutional system"[10] is at stake in such cases.[11]

An independent power is one that the Constitution grants to a specific branch; if the Constitution grants the same power to both Congress and the President, it is concurrent. Conversely, an exclusive power is one that the Constitution *solely* grants to one branch. While this framework may seem straightforward, the Constitution does not always clearly allocate powers between the branches, and so the determination of whether a branch has an independent or exclusive power can be tricky. For the executive branch, the logical starting point is Article II of the Constitution, which defines the executive branch's powers.[12] The President has few enumerated powers, and so the discernment of an independent or exclusive power will often turn on the Vesting Clause[13] and the Commander-in-Chief Clause,[14] the two most gen-

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[5] *Youngstown*, 343 U.S. at 635–39 (Jackson, J., concurring).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 638.
[11] *Id.* at 640.
[12] U.S. Const. art. II.
[13] U.S. Const. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").
[14] U.S. Const. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.").

eral grants of power to the executive. As the Vesting Clause simply provides the President with "[t]he executive power," it is unclear what this actually includes.[15] There has been a plethora of scholarship on this question[16]—some believe the clause evinces a broad notion of presidential power,[17] while others read it as a more modest grant.[18] On the other hand, Congress's powers, laid out in Article I, are more numerous and are enumerated much more specifically. The danger of *Zivotofsky II* is that it provides a blueprint for the executive branch to establish an exclusive power and gives a determined executive branch the justification it needs to push more deeply into territory traditionally considered legislative.

The Constitution's scheme of separated powers gives each branch checks and balances to prevent encroachment on its domain. For instance, while Congress has the power to pass legislation, the President may veto those laws if he or she wishes.[19] Even then, Congress may override this veto if two-thirds of each house concurs.[20] As a final measure, the President may attach a signing statement to a bill when signing it into law.[21] Signing statements have no legal force; they simply communicate a President's interpretation, objections, and planned implementation of a law.[22] While rarely used before the Reagan Administration, they have now become common practice.[23] Signing statements came to the public's attention during George W. Bush's presidency; many people saw their use as an unconstitutional intrusion into Congress's domain.[24] Nevertheless, most legal scholars maintain that signing statements themselves are constitutional but that the *content* of President Bush's signing statements were problematic.[25] Some signing statements even proclaim an intention not to enforce a duly enacted law, often where the President believes the law to be unconstitutional.[26] Scholars are

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[15] U.S. CONST. art. II, § 1, cl. 1.

[16] *See, e.g.*, Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 314–15 (2009). This debate goes back to the Founding era; Alexander Hamilton and James Madison, using pseudonyms, exchanged letters debating the scope of the executive power as granted by the Vesting Clause. *Id.*

[17] *See generally* Richard K. Sala, *The Illusory Unitary Executive: A Presidential Penchant for Jackson's Youngstown Concurrence*, 38 VT. L. REV. 155, 156–57 (2013) (explaining that this theory is most commonly associated with the Bush Administration, and, more specifically, with George Bush's Deputy Assistant U.S. Attorney General in the Office of Legal Counsel, John Yoo); Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070 (2009).

[18] *See generally* David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. INT'L L. & FOREIGN AFF. 75 (2007).

[19] U.S. CONST. art. I, § 7, cl. 2–3.

[20] *Id.*

[21] *The President's Role in the Legislative Process*, 125 HARV. L. REV. 2068, 2068 (2012).

[22] *Id.* at 2069.

[23] *Id.* at 2068.

[24] *Id.* at 2069.

[25] *Id.*

[26] *See, e.g.*, Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 32 WEEKLY COMP. PRES. DOC. 260–62 (Feb. 10, 1996) ("Consequently, I have con-

split on whether this is acceptable for non-constitutional reasons such as resource scarcity.[27]

II. A SUMMARY OF *ZIVOTOFSKY II*

In 2002, Congress enacted Section 214 of the Foreign Relations Authorization Act, a law contradicting a long-held executive policy that no country holds sovereignty over Jerusalem.[28] As part of this executive policy, passports issued by the U.S. State Department simply list Jerusalem as the place of birth rather than Israel or Palestine.[29] Section 214 gave those born in Jerusalem the option to list Israel as their place of birth on their passports should they elect to do so.[30] George W. Bush signed Section 214 but attached a statement indicating that the statute was unconstitutional so far as it allowed Congress to usurp the executive role of maintaining recognition terms.[31] The parents of Menachem Zivotofsky, a boy born in Jerusalem, sued the Secretary of State to challenge the State Department's continued policy in the face of Section 214's enactment.[32] In the first iteration of this case, *Zivotofsky v. Clinton* (*Zivotofsky I*), the D.C. Circuit did not reach the merits of the question; they held that the case presented a non-justiciable political question.[33]

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cluded that this discriminatory provision is unconstitutional. . . . In accordance with my constitutional determination, the Attorney General will decline to defend this provision."); Statement on Signing the Union Station Redevelopment Act of 1981, 1 PUB. PAPERS 1207 (Dec. 29, 1981) ("Accordingly, this language of section 114(e) must be objected to on constitutional grounds. The Secretary of Transportation will not, consistent with this objection, regard himself as legally bound by any such resolution.")

[27] Daniel Stepanicich, *Presidential Inaction and the Constitutional Basis for Executive Nonenforcement Discretion*, 18 U. PA. J. CONST. L. 1507, 1537–40 (2016).

[28] *See* U.N. GAOR, 5th Emergency Sess., 1554th plen. mtg. at 10, U.N. Doc. A/PV.1554 (July 14, 1967) (statement by U.S. Ambassador to the United Nations Arthur Goldberg) ("My Government does not recognize that the administrative measures taken by the Government of Israel on 28 June can be regarded . . . as prejudging the final and permanent status of Jerusalem."). This U.S. policy stems from the original U.N. General Assembly Resolution that divided the British Mandate of Palestine into Arab and Jewish states—the Resolution declared Jerusalem a separate entity belonging to no country, a policy followed by most foreign entities since then, including the United States. Sam F. Halabi, *Jerusalem in the Courts and on the Ground*, 26 FLA. J. INT'L L. 223, 224 (2014). Jerusalem is important in that both Palestine and Israel claim it as their capital city, and so it is a critical component of any two-state solution between the states. *Id.* at 234.

[29] *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry (Zivotofsky II), 135 S. Ct. 2076, 2082 (2015).

[30] *Id.*

[31] *Id.* ("[Section 214 would,] if construed as mandatory rather than advisory, 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." (quoting Presidential Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1697, 1698 (Oct. 7, 2003))).

[32] *Id.* at 2083.

[33] Zivotofsky v. Secretary of State, 571 F.3d 1227, 1233 (D.C. Cir. 2009). The political question doctrine bars courts from hearing cases outside the judicial scope; while it finds its origins in *Marbury v. Madison*, 5 U.S. 137 (1803), the present-day doctrine was elaborated in a six-factor test in *Baker v. Carr*, 369 U.S. 186 (1962): "[1.] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2.] a lack of judicially

The Supreme Court disagreed and remanded the case to the Court of Appeals to decide the constitutionality of Section 214.[34] On remand, the D.C. Circuit held the statute unconstitutional as it burdened the executive branch's recognition power; the Supreme Court granted certiorari.[35] Justice Kennedy, writing for the majority, affirmed the judgment of the D.C. Circuit and declared the statute to be unconstitutional.[36] He found that Section 214 burdened the Executive's exclusive recognition power by requiring the President to "contradict an earlier recognition determination in an official Executive Branch document."[37]

The Court's ruling is interesting for two reasons: first, it is the first time an executive action was upheld against congressional disagreement, and second, Justice Kennedy finds an inherent and exclusive recognition power in the Constitution. However, before Justice Kennedy reaches the question of exclusivity, he first determines whether there is an inherent recognition power. He does so primarily through the Reception Clause of the U.S. Constitution and a historical understanding that receiving ambassadors amounts to recognition.[38] As there is some ambiguity regarding whether the Framers of the Constitution indeed understood the Clause in this way, Justice Kennedy buttresses his conclusion with reference to the Treaty Clause and the Appointments Clause.[39] These clauses are relevant as recognition can also be effected through "the conclusion of a bilateral treaty," or the "formal initiation of diplomatic relations."[40] While congressional approval is needed on both accounts, Justice Kennedy finds it crucial that the President has the sole power to initiate both processes.[41]

Even more important is how Justice Kennedy reaches an *exclusive* recognition power. He begins with a structural and textual argument that al-

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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." *Developments in the Law—The Political Question Doctrine, Executive Deference, and Foreign Relations*, 122 HARV. L. REV. 1193, 1195 (2009) (citing Baker, 369 U.S. at 217). Some believe that only the first two *Baker* factors remain after *Zivotofsky I*. *See, e.g.*, Chris Michel, *There's No Such Thing as a Political Question of Statutory Interpretation: The Implications of* Zivotofsky v. Clinton, 123 YALE L.J. 253, 256 n.19 (2013).

[34] Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 202 (2012).

[35] *Zivotofsky II*, 135 S. Ct. at 2083.

[36] *Id.* at 2096.

[37] *Id.*

[38] *Id.* at 2085; U.S. CONST. art. II, § 3, cl. 4 ("[H]e shall receive Ambassadors and other public Ministers . . . .").

[39] *See Zivotofsky II*, 135 S. Ct. at 2085; *see also* U.S. CONST. art. II, § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court . . . .").

[40] *Zivotofsky II*, 135 S. Ct. at 2085.

[41] *Id.* at 2086.

ludes to his previous discussion on an inherent power—specifically, "[t]he various ways in which the President may unilaterally effect recognition—and the lack of any similar power vested in Congress . . . ."[42] He follows this with an examination of relevant Supreme Court precedent wherein he endorses an exclusive executive recognition power.[43] However, by Justice Kennedy's own admission, these cases were not ones where Congress directly opposed the executive policy, and so discussions of exclusivity were not directly relevant to the holdings—that is to say, they were dicta.[44] Relatedly, Justice Kennedy also examines historical executive practice and congressional acquiescence to that practice.[45] He cites a litany of episodes, ranging from George Washington's recognition of Citizen Genet to Jimmy Carter's recognition of the People's Republic of China.[46] Just as with the discussion on precedent, Congress was either silent or concurred with the President's determination in each instance, and therefore, an exclusive recognition power was not at issue. Lastly, Justice Kennedy moves to the heart of his argument: functional considerations. He stresses the importance of the nation speaking with one voice in recognition to let foreign nations know where the United States stands on diplomatic issues.[47] That voice must be that of the President's for the sake of unity, a characteristic that Congress lacks due to its multitudinous membership.[48] Justice Kennedy also cites the various other functional qualities that Alexander Hamilton believed came with unity: "[d]ecision, activity, secrecy, and dispatch."[49]

Through all this analysis, one problem persists: Section 214 does not expressly involve recognition. As Chief Justice Roberts points out in his dissent, the "place of birth" line on a passport is not an accepted act of recognition.[50] The Court is cognizant of this problem and concludes that Section 214 is an aggrandizement of Congress's powers in that it "require[s] the President to contradict an earlier recognition determination in an official document issued by the Executive Branch."[51]

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[42] *Id.*

[43] *Id.* at 2088.

[44] *Id.* at 2089 (conceding that "[i]t is true, of course, that *Belmont* and *Pink* are not direct holdings that the recognition power is exclusive," and that "[t]he President's determination in those cases did not contradict an Act of Congress").

[45] *Id.* at 2091.

[46] *Id.* at 2091–94.

[47] *Id.* at 2086 ("Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received; whether their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights. These assurances cannot be equivocal.").

[48] *Id.*

[49] *Id.* at 2086 (quoting THE FEDERALIST NO. 70, at 424 (Alexander Hamilton)).

[50] *Id.* at 2114 (Roberts, J., dissenting) ("And the annals of diplomatic history record no examples of official recognition accomplished via optional passport designation.").

[51] *Id.* at 2096.

III. What Remains of *Curtiss-Wright*

Executive branch lawyers have long recited "*Curtiss-Wright*, so I'm right" to support acts of inherent and exclusive power.[52] This is a reference to dictum from *United States v. Curtiss-Wright Export Corp.*, a case that examined whether Congress could delegate to the President the power to institute an arms embargo.[53] In upholding the delegation, the Court noted that this grant of power was less problematic as it came in the field of foreign relations, an area in which the President possessed strong inherent powers.[54] But the main reason this case is remembered is for its citation to a statement Chief Justice John Marshall gave to the House of Representatives: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[55] Prior to *Zivotofsky II*, the Supreme Court had never directly affirmed or repudiated this dictum. Nevertheless, it has taken on a life of its own within the executive branch. It is frequently cited in Office of Legal Counsel (OLC) opinions, as well as briefs of Solicitors General to support broad exercises of executive power.[56] The Court in *Zivotofsky II* finally addressed this dictum head-on and sought to drain it of its importance. It chastised the Secretary of State for invoking *Curtiss-Wright* and "decline[d] to acknowledge that unbounded power."[57] It then clarified that although the President has a unique role when it comes to foreign relations, lawmaking remains the domain of Congress.[58]

Although it explicitly rejected the Government's use of *Curtiss-Wright*, the Court nonetheless went on to uphold the executive action at hand using much of the same functional analysis used in *Curtiss-Wright*.[59] As a result, it

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[52] Harold Hongju Koh, The National Security Constitution: Sharing Power After the Iran-Contra Affair 94 (1990) ("Among government attorneys, Justice Sutherland's lavish description of the president's powers is so often quoted that it has come to be known as the '*Curtiss-Wright*, so I'm right' cite.").

[53] *See* 299 U.S. 304, 315 (1936).

[54] *Id.* at 319.

[55] *Id.*

[56] *See, e.g.*, Presidential Power to Use the Armed Forces Abroad without Statutory Authorization, 4A Op. O.L.C. 185, 186 (1980); The President's Constitutional Auth. to Conduct Military Operations against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 196 (2001); Brief for Respondents at 38, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184); Brief for Respondents at 19, Rasul v. Bush, 542 U.S. 466 (2004) (No. 05-184). OLC is a branch of the Department of Justice that provides legal advice to executive agencies and the President. Eric Messinger, *Transparency and the Office of Legal Counsel*, 17 N.Y.U. J. Legis. & Pub. Pol'y 239, 241–42 (2014).

[57] *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry (Zivotofsky II), 135 S. Ct. 2076, 2089 (2015).

[58] *Id.* at 2090.

[59] Jack Goldsmith, Zivotofsky II *as Precedent in the Executive Branch*, 129 Harv. L. Rev. 112, 130 (2015) ("[The Court] relied on expansive *Curtiss-Wright*-like functional arguments for presidential exclusivity throughout the opinion."); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) ("The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.").

is likely that *Zivotofsky II* will inherit the role of *Curtiss-Wright* within the executive department. In fact, *Zivotofsky II* may be even stronger precedent than *Curtiss-Wright* ever was. For one, in *Zivotofsky II*, functional considerations are used to directly support the holding rather than as supplemental dicta.[60] Along those same lines, *Curtiss-Wright* was a case of executive action with congressional authorization. Under Justice Jackson's framework from *Youngstown Sheet & Tube Co. v. Sawyer*, this puts the President's "authority . . . at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[61] Therefore, while the "sole organ" language is helpful, its context is one in which the President's authority is usually unchallenged. *Zivotofsky II* is much stronger precedent as it relates to executive action in the face of congressional prohibition, a state in which Jackson believed the President's "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."[62] The President must have an exclusive power to win in such a situation and the claim to such an exclusive power should be "scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[63] For roughly sixty years after *Youngstown*, no President has been able to overcome this test in foreign affairs.[64] The fact that *Zivotofsky II* uses functional considerations to find this exclusive power renders it much more powerful and effective precedent for executive branch lawyers than *Curtiss-Wright*.

To be fair, the Court disclaims any intention to extend this opinion further than the question of recognition when it says, "[t]his case is confined solely to the exclusive power of the President to control recognition determinations."[65] While this may be the case, lawyers might eschew this warning as time goes on. That the oft-cited language in *Curtiss-Wright* was dicta did not stop its rapid proliferation. In fact, its impact was not readily apparent until two decades after it was decided.[66] By that time, *Curtiss-Wright* had been stripped of its context and merely represented the idea of a President

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[60] *See Zivotofsky II*, 135 S. Ct. at 2086 ("Recognition is a topic on which the Nation must 'speak . . . with one voice'') (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000)). "That voice must be the President's." *Id.* Between the two political branches, only the Executive has the characteristic of unity at all times, and with unity comes the ability to exercise, to a greater degree, "[d]ecision, activity, secrecy, and dispatch." THE FEDERALIST NO. 70, at 424 (Alexander Hamilton). The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition. *See, e.g.*, United States v. Pink, 315 U.S. 203, 229 (1942) ("He is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law.").

[61] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[62] *Id.* at 637.

[63] *Id.* at 638.

[64] *Zivotofsky II*, 135 S. Ct. at 2113 (Roberts, J., dissenting).

[65] *Id.* at 2096.

[66] Kimberley Fletcher, *The Court's Decisive Hand Shapes the Executive's Foreign Affairs Policymaking Power*, 73 MD. L. REV. 247, 263 (2013).

with broad, exclusive executive powers.[67] Therefore, while the *Zivotofsky II* Court has tried to limit the opinion's effect, future administrations may disregard Justice Kennedy's disclaimer and use this case to further executive power.

IV. Unique Features of *Zivotofsky II*

Not only is *Zivotofsky II* probably going to replace *Curtiss-Wright* as support for broad inherent executive power in OLC opinions, but its unique structure may be transformative in other ways as well. In its inquiry regarding exclusive recognition power, the Court notes the many ways in which the President may effect recognition and the dearth of ways in which Congress may do so.[68] And the Court reaches this conclusion without examining Article I of the Constitution to see whether this is true or not; Justice Scalia points this out in his dissent and references an instance in 1934 in which Congress enacted legislation that granted independence to the Philippines, and that directed the executive branch to act accordingly.[69] There is also a textual argument for the existence of a congressional recognition power. In a 2015 article in *Harvard Law Review*, Jack Goldsmith, Harvard Law School Professor and former Assistant Attorney General for OLC, suggests that such a congressional power may flow from a combination of the Declare War Clause, the Commerce Clause, and the Necessary and Proper Clause.[70] It is unclear whether the Court agreed with this line or reasoning, however, as it did not delve into the issue of Article I powers.

Another interesting aspect of this opinion, and perhaps the most important, is its application of Jackson's Category Three and his prescription of a "severe test" with the President's powers at their "lowest ebb."[71] While the Court takes notice of this language at the start of its opinion, it is questionable whether it faithfully applies it.[72] Instead of scrutinizing the President's claim of an exclusive power with caution, the Court upholds it largely based on functional considerations with the help of conflicting history, dicta, and unsupported claims of text and structure. Chief Justice Roberts's dissent comes to the same conclusion and chastises the majority for how it applies Justice Jackson's framework.[73] Given that this is the first time the President has prevailed in Category Three, *Zivotofsky II* may serve as a blueprint for

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[67] Anthony Simones, *The Reality of* Curtiss-Wright, 16 N. Ill. U. L. Rev. 411, 419 (1996).

[68] *See Zivotofsky II*, 135 S. Ct. at 2086.

[69] *Id.* at 2118 (Scalia, J., dissenting).

[70] Goldsmith, *supra* note 59, at 119–20.

[71] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–40 (1952) (Jackson, J., concurring).

[72] *Zivotofsky II*, 135 S. Ct. at 2084 ("In this case the Secretary contends that § 214(d) infringes on the President's exclusive recognition power . . . [and] [i]n so doing the Secretary acknowledges the President's power is 'at its lowest ebb.'").

[73] *Id.* at 2113–16 (Roberts, J., dissenting).

future Category Three presidential actions. The executive branch may believe that it can proceed in the face of contradictory legislation so long as it has functional justifications for an exclusive presidential power, and it will have Supreme Court precedent supporting it. This will not be a difficult endeavor given the ease with which one can summon one functional consideration or another to support any presidential action. In fact, the newly elected Trump Administration may have the opportunity to test this theory with its revised immigration ban.[74] Some legal commentators believed that the original ban violated The Immigration and Nationality Act of 1965 (INA), which prohibits discrimination "because of [a] person's race, sex, nationality, place of birth or place of residence."[75] Before a court could rule on the merits though, the Trump Administration withdrew the original ban and released a revised version.[76] As the new ban still discriminates on the basis of nationality, concerns that the order may run afoul of the INA linger. Currently, the ban has been halted pursuant to a temporary restraining order issued by a federal district court in Hawaii, as well as a partial temporary restraining order issued by a federal district court in Maryland.[77] Although the Hawaiian District Court ruling was based on Establishment Clause arguments,[78] the Maryland District Court opinion found a likelihood of success on the merits for both Establishment Clause and statutory arguments.[79] While the Maryland District Court did not discuss *Zivotofsky II* or the *Youngstown* framework, that is likely to come up in a more comprehensive ruling on the merits. This is a clear example of how *Zivotofsky II* could greatly erode Justice Jackson's three-tier framework and the scrutiny it prescribed to the

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[74] *See* Exec. Order No. 13,780, 82 Fed. Reg. 45, 13209 (Mar. 9, 2017).

[75] *See* David J. Bier, *Trump's Immigration Ban Is Illegal*, N.Y. Times (Jan. 27, 2017), https://www.nytimes.com/2017/01/27/opinion/trumps-immigration-ban-is-illegal.html [https://perma.cc/SR2Y-RMM4]; Adam Liptak, *President Trump's Immigration Order, Annotated*, N.Y. Times (Jan. 28, 2017), https://www.nytimes.com/2017/01/28/us/politics/annotating-trump-immigration-refugee-order.html [https://perma.cc/48C4-TN6M].

[76] *See* Glenn Thrush, *Trump's New Travel Ban Blocks Migrants From Six Nations, Sparing Iraq*, N.Y. Times (Mar. 6, 2017), https://www.nytimes.com/2017/03/06/us/politics/travel-ban-muslim-trump.html [https://perma.cc/WWN2-2YVT] .

[77] Alexander Burns, *2 Federal Judges Rule Against Trump's Latest Travel Ban*, N.Y. Times (Mar. 15, 2017), https://www.nytimes.com/2017/03/15/us/politics/trump-travel-ban.html [https://perma.cc/L7DR-9BCW].

[78] Matt Zapotosky et al., *Federal judge in Hawaii freezes President Trump's new entry ban*, Wash. Post (Mar. 16, 2017), https://www.washingtonpost.com/local/social-issues/lawyers-face-off-on-trump-travel-ban-in-md-court-wednesday-morning/2017/03/14/b2d24636-090c-11e7-93dc-00f9bdd74ed1_story.html?utm_term=.62517677a360 [https://perma.cc/5KXL-CFYX].

[79] *International Refugee Assistance Project v. Trump*, No. TDC–17–0361, 2017 WL 1018235, at *18 ("The Court has found that Plaintiffs are likely to be able to establish that Section 2(c) of the Second Executive Order violates the Establishment Clause."); *id.* at *10 ("Because there is no clear basis to conclude that § 1182(f) is exempt from the non-discrimination provision of § 1152(a) . . . the Court concludes that Plaintiffs have shown a likelihood of success on the merits of their claim that the Second Executive Order violates § 1152(a)."). This temporary restraining order is partial as it only applies to restrictions on the issuance of *immigrant* visas, and not non-immigrant visas. *Id.*

President in a clash between the political branches—a standard Jackson believed was necessary to preserve the separation of powers.

Lastly, the Court finds the exclusive presidential power was infringed upon, not because Congress sought to exercise it, but because Congress made use of another power that the Court felt burdened the President's exclusive recognition power.[80] The Court admits that Congress has "substantial authority over passports," with the problem being "how Congress exercised its authority over passports."[81] The executive branch may seize on to this logic to extend the scope of its powers to encompass both already-established powers and those that touch on them.

V. How *Zivotofsky II* May Be Used by the Executive Branch

Given the nature of separation of powers disputes, they are usually not litigated in court for lack of justiciability.[82] Courts will often conclude that such issues are political questions that should be left to the political branches to handle, or there will be no plaintiff with standing to bring such claims in an Article III court.[83] Consequently, many of these issues are resolved entirely within the executive branch, and specifically within OLC.[84] This is where *Zivotofsky II* is likely to see its biggest impact, much like *Curtiss-Wright* before it.

Zivotofsky II may see aggressive use by executive branch lawyers in areas where the constitutional distribution of powers is unclear and in which functional considerations suggest an exclusive presidential power may be warranted. Given these considerations, the fields of national security and war powers are likely to be most impacted. While Article I grants Congress a bevy of specific powers in these areas, there are many instances in which the Constitution is either silent or ambiguous.[85] As technology progresses and the nature of war evolves from what the Founders imagined, more and more of these constitutional dead zones will spring up, areas that the Constitution neither explicitly commits to the executive branch nor Congress. In

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[80] Zivotofsky *ex rel.* Zivotofsky v. Kerry (Zivotofsky II), 135 S. Ct. 2076, 2096 (2015).
[81] *Id.*
[82] *See* Goldsmith, *supra* note 59, at 133.
[83] *See id.*
[84] *See id.* at 135.
[85] *See, e.g.*, U.S. Const. art. I, § 8, cl. 1 ("Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."); *id.* cl. 10 ("[Power] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . ."); *id.* cl. 11 ("[Power] [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"); *id.* cl. 12 ("[Power] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . . ."); *id.* cl. 13 ("[Power] To provide and maintain a Navy . . . ."); *id.* cl. 14 ("[Power] To make Rules for the Government and Regulation of the land and naval Forces . . . ."); *id.* cl. 15 ("[Power] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . ."); *id.* cl. 16 ("[Power] To provide for organizing, arming, and disciplining, the Militia . . . .").

such cases, the executive branch possesses an inherent advantage in that it can point to the comparatively broad Commander-in-Chief Clause as textual support for unilateral action in war and national security.[86] Consequently, the executive branch is less limited by what the Founders could have imagined when drafting the Constitution. Executive branch lawyers typically cite to the Commander-in-Chief Clause in tandem with *Curtiss-Wright* to demonstrate the President's broad powers in foreign relations.[87] This tactic is especially effective where Congress does not have a specific Article I power to which it can point in response. *Zivotofsky II* will lend greater credence to this claim and strengthen the ability of the executive branch to use the Commander-in-Chief Clause as a springboard for an exclusive national security or war power claim.

Zivotofsky II may also be strong precedent in areas where the political branches are not in conflict. Many executive exercises of national security and war powers come in the face of congressional silence.[88] The President only requires inherent power to act in these situations, and *Zivotofsky II* can provide a stronger footing for an independent power claim.[89] While there may be no congressional challenge, the President still must justify broad exercises of executive power to the public. Alternatively, the President may want to lay the groundwork for an exclusive executive power in a particular area in case Congress later decides to legislate in that area, precisely the situation that spawned *Zivotofsky II*.

Executive branch lawyers may not even need to use *Zivotofsky II* to conclusively prove the existence of an exclusive executive power in an area. It may be enough that it raises a constitutional question sufficient to trigger the canon of constitutional avoidance. When a court invokes the canon, it will attempt to construe a statute in a way that avoids implicating any constitutional issues.[90] This is an argument that OLC already frequently employs, particularly in national security and war power contexts.[91] Now that there is Supreme Court precedent upholding an exclusive executive power largely on

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[86] U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .").

[87] *See, e.g.*, Presidential Power to Use the Armed Forces Abroad without Statutory Authorization, 4A Op. O.L.C. 185, 186 (1980).

[88] *See, e.g.*, Exec. Order No. 12,333, 3 C.F.R. § 200 (1982). This executive order governs all foreign surveillance except for electronic communication covered by the 2008 FISA Amendments Act (FAA), and rests on the President's inherent foreign relations powers. *See* Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 HARV. J.L. & PUB. POL'Y 117, 149 (2015).

[89] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("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.").

[90] *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1192 (2006).

[91] *Id.* at 1193.

functional grounds, OLC can simply recite some of these functional considerations, cite to *Zivotofsky II*, and conclude that, at the very least, a constitutional question has been raised. This is a more powerful argument than when OLC was using *Curtiss-Wright* dictum to support invocation of the constitutional avoidance canon. As interpreting a statute to be *not* inconsistent with executive action is effectively the same as upholding executive action, invoking the canon of avoidance is a useful strategy for OLC. For example, the President may be able to close Guantánamo Bay over Congressional dissent without definitively establishing an exclusive detention power. Under the canon, transfer restrictions could be read not to implicate executive power and not to stand in the way of executive branch closure of the prison. *Zivotofsky II* helps by providing additional support for an exclusive detention power—or alternatively, an exclusive diplomacy power—and creating a greater likelihood of a constitutional question arising.

VI. Potential Applications of *Zivotofsky II* in National Security and War Powers

Zivotofsky II is most likely to be employed in the arenas of national security and war powers. More specifically, *Zivotofsky* will likely be invoked in key areas within these two fields where the balance of constitutional power is unclear, such as in detention, initiation of hostilities, and surveillance.

Since the War on Terror began, the executive branch's treatment of detainees has been fairly controversial, especially the treatment of those being held in Guantánamo Bay.[92] Public criticism and a shift in executive policy eventually led to a dispute between the Obama Administration and Congress on the closure of Guantánamo. Congress placed restrictions on the use of appropriated funds to transfer detainees to the U.S. mainland or to foreign nations.[93] The first section of this part discusses how the executive branch might reach an exclusive detention power to transfer detainees in the face of this congressional ban using *Zivotofsky II*. Alternatively, the executive branch could claim an exclusive diplomacy power to negotiate more freely with foreign nations and transfer detainees internationally. On the other hand, there is also the possibility of a future administration keeping a detention facility open against the wishes of Congress.

Dating back to the founding of the United States, there has been a tug-of-war between the political branches on the power to initiate hostilities. Over time, the executive branch has gone from asserting a power to repel invasions to a broader power to initiate hostilities of a limited nature that

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[92] *See* Ernesto Hernández-López, *Guantánamo as a "Legal Black Hole": A Base for Expanding Space, Markets, and Culture*, 45 U.S.F. L. Rev. 141, 143 (2010).

[93] *See* Christopher M. Ford, *From Nadir to Zenith: The Power to Detain in War*, 207 Mil. L. Rev. 203, 235 (2011) ("[T]he Act also prohibited the use of any appropriated funds to release any detainee from Guantanamo to any location in the world . . . .").

sufficiently implicate U.S. interests.[94] In response to expanding executive power, Congress enacted the War Powers Resolution (WPR), its own interpretation of the constitutional balance of war powers.[95] Richard Nixon originally vetoed the law as "clearly unconstitutional" but was overridden; since then, the executive branch has mostly attempted to work around its contours.[96] The second section of this part discusses how *Zivotofsky II* could provide an opportunity for the President to challenge the WPR head-on as an impermissible intrusion on the executive's war powers. Indeed, functional considerations could certainly be said to push in this direction. While OLC has already made this argument, it would have a much stronger foundation to stand on with actual Supreme Court precedent.[97]

Although there is not much separation between Congress and the President on surveillance policy right now, such a separation has existed in the past and could exist in the future. Following the attacks of September 11, 2001, President Bush instituted a program of warrantless surveillance that was arguably in contravention of the Foreign Information Surveillance Act (FISA).[98] FISA was eventually amended in 2008 by the FISA Amendments Act (FAA), giving the executive branch most of the powers it desired.[99] However, after backlash stemming from the Edward Snowden leaks, there has been public pressure on Congress to increase restrictions on government surveillance activities, pressure to which Congress has already begun responding.[100] If this rollback of executive power continues, there may be temptation to declare surveillance an inherent, exclusive executive power that the legislature may not burden. The last section of this part explores how the executive branch might decide to use *Zivotofsky II* to support this proposition.

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[94] *See* Auth. to Use Military Force in Libya, 35 Op. O.L.C. 1, 6–8 (2011).

[95] War Powers Act, 50 U.S.C. §§ 1541–48 (1976) (limiting the terms under which the executive branch may engage in hostilities).

[96] Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 108 (1984).

[97] *See, e.g.*, Presidential Power to Use the Armed Forces Abroad without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980) ("This pattern of presidential initiative and congressional acquiescence may be said to reflect the implicit advantage held by the executive over the legislature under our constitutional scheme in situations calling for immediate action."); Auth. to Use Military Force in Libya, 35 Op. O.L.C. 1, 7 (2011) (citing 1980 OLC opinion on use of force in Iran).

[98] Adrienne Ratner, *Warrantless Wiretapping: The Bush Administration's Failure to Jam an Elephant into a Mousehole*, 37 HASTINGS CONST. L.Q. 167, 167–68 (2009).

[99] Stephanie Cooper Blum, *What Really Is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform*, 18 B.U. PUB. INT. L.J. 269, 297–98 (2009).

[100] *See* Devon Ombres, NS*A Domestic Surveillance from the PATRIOT Act to the FREEDOM Act: The Underlying History, Constitutional Basis, and the Efforts at Reform*, 39 SETON HALL LEGIS. J. 27, 41–50 (2015). Edward Snowden was a former Central Intelligence Agency (CIA) contractor who, in 2013, leaked thousands of documents exposing the National Security Agency's (NSA) surveillance activities. Margaret B. Kwoka, *Leaking and Legitimacy*, 48 U.C. DAVIS L. REV. 1387, 1390 (2015).

A. Detention

Since the advent of the War on Terror, hundreds of suspected terrorists have been captured in foreign countries and subsequently detained in Guantánamo Bay.[101] After years of litigation, the Supreme Court largely blessed this practice, albeit with some modifications.[102] Through the late 2000s and into the Obama Administration, the government's enthusiasm for sending prisoners to Guantánamo steadily waned; in fact, President Obama named the closure of Guantánamo a key goal of his time in office.[103] However, subsequently enacted legislation made it very difficult for President Obama to follow through on this promise.[104] The Supplemental Appropriations Act (SAA) of 2010 places significant restrictions on the President's ability to transfer Guantánamo detainees either within the United States or to foreign countries.[105] Although President Obama signed the SAA and the National Defense Authorization Acts (NDAAs) that followed it, he attached signing statements to the NDAAs expressing the executive branch's position that the transfer restrictions may violate constitutional separation of powers principles in some cases.[106] In 2016, President Obama even came up with a strategy to close the prison once and for all before the end of his presidency.[107] The plan involved moving the majority of the detainees to foreign countries and transferring the rest to a prison facility within the United States main-

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[101] Nathaniel H. Nesbitt, *Meeting Boumediene's Challenge: The Emergence of an Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation*, 95 MINN. L. REV. 244, 248 (2010).

[102] *Id.* at 249–51 (noting that *Hamdi v. Rumsfeld* established that detainees must be granted procedural protections and *Boumediene v. Bush* granted detainees the power to seek habeas review).

[103] Exec. Order No. 13,492, 74 Fed. Reg. 4897, 4898 (Jan. 27, 2009) ("The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order.").

[104] *See* Ford, *supra* note 93, at 235.

[105] *Id.* ("Specifically, the Act prohibited the use of appropriated funds to facilitate the release of any detainee from 'Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia.' . . . [T]he Act also prohibited the use of any appropriated funds to release any detainee from Guantanamo to any location in the world until 'the President submits to the Congress, in classified form fifteen days prior to such transfer' certain information.").

[106] *See* Statement on Signing the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, 1 PUB. PAPERS 7–8 (Jan. 7, 2011); Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2 PUB. PAPERS 1573–75 (Dec. 31, 2011); Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, DAILY COMP. PRES. DOC. 00004 (Jan. 2, 2013); Statement on Signing the National Defense Authorization Act for Fiscal Year 2014, DAILY COMP. PRES. DOC. 00876 (Dec. 26, 2013); Statement on Signing the Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, DAILY COMP. PRES. DOC. 00945 (Dec. 19, 2014); Statement on Signing the National Defense Authorization Act for Fiscal Year 2016, DAILY COMP. PRES. DOC. 00843 (Nov. 25, 2015).

[107] Kevin Liptak & Elise Labott, *Obama Gives Congress Guantanamo Closure Plan*, CNN (Feb. 23, 2016, 3:26 PM), http://www.cnn.com/2016/02/23/politics/guantanamo-bay-obama-prison-closure-plan [https://perma.cc/GM9R-BWUU].

land.[108] President Obama resolved to use "all legal tools to deal with the remaining detainees," but would not "rule out unilateral action."[109]

As this is a Category Three case, the executive branch would have to establish an inherent, exclusive power to act against Congress's wishes. There is some groundwork for an inherent detention power in opinions from the early Bush Administration. A 2002 OLC memorandum regarding the transfer of Jose Padilla, a U.S. citizen, outlines an inherent executive power to detain flowing from the Commander-in-Chief Clause.[110] However, this memorandum came as part of a string of opinions pushing a theory of executive power largely rejected by the legal community, so its precedential value is unclear.[111] What OLC may find more favorable is a set of briefs filed by the Government in two seminal detention cases, *Rumsfeld v. Padilla*[112] and *Boumediene v. Bush*.[113] The Solicitor General concurred that the President possessed an inherent detention power, emanating from the Commander-in-Chief Clause, to detain enemy combatants during wartime.[114] The executive branch has also previously exercised a unilateral detention power without dissent from Congress. Leading up to the Battle of New Orleans in 1814, General Andrew Jackson detained a newspaper reporter and a federal judge without congressional authorization.[115] In response, Congress did nothing.[116] A couple of years later, Jackson invaded Spanish Florida and detained two British citizens accused of aiding the Seminoles, again without authorization from Congress.[117] Just as before, Congress remained silent.[118]

Reaching an exclusive power to detain would be a little trickier, but a task made easier with *Zivotofsky II* as precedent. *Zivotofsky II* provides a blueprint on what is needed to find an exclusive executive power necessary to withstand congressional prohibition. Just as text, history, and precedent

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[108] *Id.*

[109] *Id.*

[110] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Daniel J. Bryant, Assistant Att'y Gen., U.S. Dep't of Justice, Re: Applicability of 18 U.S.C. § 4001(a) to Military Detention of United States Citizens 1 (June 27, 2002) ("[T]he President's authority to detain enemy combatants, including U.S. citizens, is based on his constitutional authority as Commander in Chief."). Jose Padilla was being held as an enemy combatant for "conspir[ing] with al Qaeda to carry out terrorist attacks in the United States." Rumsfeld v. Padilla, 542 U.S. 426, 430 (2004).

[111] Janet Cooper Alexander, *John Yoo's War Powers: The Law Review and the World*, 100 CAL. L. REV. 331, 334 (2012).

[112] *See* Brief for Petitioner at 14, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027) ("The authority of the Commander in Chief to engage and defeat the enemy encompasses the capture and detention of enemy combatants wherever found, including within the Nation's borders.").

[113] Brief for Respondents at 9, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696) ("In time of war, the President, as Commander in Chief, has the authority to capture and detain enemy combatants for the duration of hostilities. That includes enemy combatants presumed to be United States citizens.").

[114] *Id.*

[115] Ford, *supra* note 93, at 220.

[116] *Id.*

[117] *Id.*

[118] *Id.* at 221.

played a role in finding an exclusive recognition power, so too can they point towards an exclusive detention power here. Article II designates the President as the Commander-in-Chief, a position that many have taken to grant unfettered detention power with regards to Congress.[119] Historical episodes involving Andrew Jackson unilaterally detaining various individuals also evince an executive power to detain.[120] However, the weight of the argument in *Zivotofsky II* rested on functional considerations, qualities that counsel towards an exclusive executive power just as strongly here. Detention decisions need to be made quickly and decisively during times of war. Many captured enemy combatants are too dangerous to be released back onto the battlefield and so the choice of whether to detain them and where to detain them has to be made at once; there might not be time for the deliberation needed for Congress to act. While this could be remedied through the consistent application of a legislative rule, the myriad circumstances that may arise on a battlefield require flexibility. Military commanders need to react to the situation on the ground and as they are the ones who face these operational difficulties on a daily basis, they would probably be the best suited to make detention decisions. If the executive indeed has an exclusive power to detain, it would still need to go a step further for the executive branch to *transfer* them. Following in the footsteps of *Zivotofsky II*, it would not be much of a stretch to extend an exclusive detention power to also encompass the power to transfer those whom the President has previously detained. Just as congressional action forcing the President to contradict a recognition decision through official statements burdened the recognition power itself, so too can forcing the President to contradict detention decisions.[121] After all, the transfer of a detainee is simply an executive decision to change the place of detention.

Still, even if the executive branch has an inherent power to detain, that does not mean Congress lacks a concurrent power. In fact, there is textual evidence for such a power in the Constitution with the Captures Clause.[122] This is the very same conclusion reached by Judge Kavanaugh of the D.C. Circuit in his concurrence to *Kiyemba v. Obama*.[123] Under Jackson's framework, if the political branches both exercise a shared power, congressional action prevails.[124] While this presents quite the challenge for the executive branch, it is important to note that *Zivotofsky II* did not even look to Article I in its exploration of an exclusive executive recognition power. Still, this tac-

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[119] U.S. CONST. art. II, § 2, cl. 1; Brief for Petitioner at 14, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027); Brief for Respondents at 9, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696).

[120] Ford, *supra* note 93, at 220.

[121] *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry (Zivotofsky II), 135 S. Ct. 2076, 2096 (2015).

[122] U.S. CONST. art. I, § 8 ("The Congress shall have Power to . . . make Rules concerning Captures on Land and Water . . . .").

[123] Kiyemba v. Obama, 561 F.3d 509, 517 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

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

tic may be more difficult in this scenario because, unlike in *Zivotofsky II*, there is fairly clear textual evidence for a congressional detention power.

Instead of looking for an exclusive detention power, the executive branch may be able to achieve its goals by looking to an exclusive diplomacy power. OLC opinions have recognized an inherent and exclusive presidential power to conduct diplomacy.[125] Just as *Zivotofsky II* found an inherent recognition power by surveying a range of constitutional provisions giving the President the power to recognize, OLC has taken a similar approach in finding an inherent diplomacy power.[126] It cites to the Vesting Clause, the Treaty Clause, the Appoint Ambassadors Clause, and the Receive Ambassadors Clause.[127] More importantly, OLC establishes the scope of this power as containing the "'exclusive authority to determine the time, scope, and objectives' of international negotiations."[128] The power to negotiate the transfer of Guantánamo detainees to foreign nations could feasibly arise from the authority to decide the scope and objectives of diplomacy. If this were an exclusive power, it would not be within congressional power to burden it, even while exercising its Article I powers. In an article regarding the closure of Guantánamo, former Legal Advisor of the Department of State Harold Koh echoed this line of reasoning and concluded that a unilateral transfer of detainees by the President would likely stand in court as an exercise of the executive power to negotiate with foreign nations.[129] Finally, President Obama has attached signing statements to the yearly NDAA transfer restrictions where he outlines various functional considerations that cut against imposing transfer restrictions on the executive branch.[130] He argues that these restrictions impede the executive branch's "flexibility to act swiftly in conducting negotiations with foreign countries regarding . . . detainee transfers."[131] President Obama also implies that the transfer restrictions hinder the ability of the government to speak with one voice in

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[125] Unconstitutional Restrictions on Activities of the Office of Sci. and Tech. Policy in Section 1340(A) of the Dept. of Def. and Full-Year Continuing Appropriations Act, 2011, 35 Op. O.L.C. 1, 4 (2011).

[126] *Id.*

[127] *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America . . . ."); *id.* art. II, § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, . . . appoint Ambassadors, other public Ministers and Consuls . . . ."); *id.* art. II, § 3 ("[H]e shall receive Ambassadors and other public Ministers . . . .").

[128] Unconstitutional Restrictions on Activities of the Office of Sci. and Tech. Policy in Section 1340(A) of the Dep't of Def. and Full-Year Continuing Appropriations Act, 2011, 35 Op. O.L.C. 1, 4 (2011).

[129] Harold Hongju Koh, *After the NDAA Veto: Now What?*, JUST SECURITY (Oct. 23, 2015, 11:46 AM), https://www.justsecurity.org/27028/ndaa-veto-what [https://perma.cc/7QQP-LPN4] ("[T]he President's action would stand even if challenged . . . as Diplomat-in-Chief and Commander-in-Chief to decide and arrange through negotiations 'when and where to transfer them consistent with our national security and our humane treatment policy.'").

[130] *See, e.g.*, Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, DAILY COMP. PRES. DOC. 00004 (Jan. 2, 2013).

[131] *Id.*

negotiations.[132] Lastly, he invokes expertise and notes that such decisions are better made through "careful and fact-based determinations, made by counterterrorism and law enforcement professionals."[133] Such functional considerations are just as persuasive as the ones given by the Court in *Zivotofsky II*, and certainly push towards an exclusive diplomacy power with regard to transferring detainees. In fact, the express language of *Zivotofsky II* itself uses the President's diplomacy power to reach its conclusion on the recognition power. The Court reasoned that the decision to recognize another country is the end result of negotiations with foreign nations, and that functional considerations strongly suggest the President is better suited to conduct these negotiations.[134] Surely then, one could construct a plausible argument that the President is just as uniquely situated to conduct negotiations that result in detainee transfers as ones that result in recognition.

President Obama actually used his exclusive diplomacy powers to act in the face of the transfer restrictions. In 2014, President Obama released five Taliban members from Guantánamo in a swap for Sergeant Bowe Bergdahl.[135] President Obama did so without notifying Congress thirty days prior to the release as required by the NDAA.[136] His Administration defended this move largely with reference to the Commander-in-Chief Clause and functional considerations—the need for a quick decision as Bergdahl's life was at risk and while the Taliban was still willing to maintain the offer.[137] National Security Council spokeswoman Caitlin Hayden quoted President Obama's NDAA signing statement wherein he stressed the need for flexibility in "negotiations with foreign countries regarding the circumstances of detainee transfers."[138] In essence, President Obama laid claim to, and exercised, an exclusive diplomacy power to contravene congressional transfer restrictions. He arrived at this power in very much the same way that the Supreme Court in *Zivotofsky II* found an exclusive recognition power: functional considerations. *Zivotofsky II* greatly strengthens the President's ability to transfer detainees to foreign countries in the face of congres-

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[132] *See* Statement on Signing the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, 1 PUB. PAPERS 7–8. (Jan. 7, 2011) ("The executive branch has sought and obtained from countries that are prospective recipients of Guantanamo detainees assurances that they will take or have taken measures reasonably designed to be effective in preventing, or ensuring against, returned detainees taking action to threaten the United States or engage in terrorist activities. . . . Requiring the executive branch to certify to additional conditions would hinder the conduct of delicate negotiations with foreign countries.").

[133] Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, DAILY COMP. PRES. DOC. 00004 (Jan. 2, 2013).

[134] *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry (Zivotofsky II), 135 S. Ct. 2076, 2086 (2015) ("The President is capable of engaging in the delicate and often secret diplomatic contacts that may lead to a recognition decision . . . .").

[135] Tom Cohen, *Was Bergdahl Swap Legal? Depends on Who You Ask*, CNN (June 3, 2014, 5:05 PM), http://www.cnn.com/2014/06/03/politics/bergdahl-swap-legality [https://perma.cc/3QJL-YP7X].

[136] *Id.*

[137] *Id.* ("Obama told reporters in Poland on Tuesday that the circumstances required an immediate decision within his authority as commander in chief.").

[138] *Id.*

sional restrictions and at the very least, gives him stronger legal footing to base his claim on. This could be enough to trigger the canon of constitutional avoidance. To avoid raising a constitutional question, the transfer restrictions could be interpreted in a way that allows executive action to stand.

However, while this tactic may have worked to transfer detainees to a foreign country, a transfer to the U.S. mainland would present separate, more difficult issues. The thirty-day notice requirement in the Bergdahl transfer was merely one of consultation, almost administrative in its nature. The NDAA has a much harsher restriction in imposing an absolute ban on the use of appropriated funds to transfer Guantánamo detainees domestically.[139] Furthermore, the transfer of detainees to the United States mainland would be unlikely to involve negotiations with another country. There is simply no credible argument for using an exclusive diplomacy power to disregard congressional restrictions that do not implicate diplomacy. Nonetheless, the power to send detainees overseas would itself go a long way in closing the prison. The NDAA places strict criteria on countries to which detainees may be repatriated.[140] Given that detainees often come from countries that cannot meet these criteria, it severely limits how many prisoners the executive branch can release from Guantánamo.[141] The number of detainees released per year has slowed greatly since the enacting of the NDAA transfer restrictions, and as of 2012, there were fifty-five cleared detainees that could not be released as a result of the restrictions.[142] President Obama made a push to transfer as many detainees out of the prison as possible in his final days in office.[143] However, with the advent of the Trump Administration, this topic may soon become relevant again. President Trump has vowed to keep the prison open and to resume transferring detainees there.[144] If this were to happen, Trump's successor may find him- or her-self trying to close

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[139] *See* Ford, *supra* note 93, at 235.

[140] David J.R. Frakt, *Prisoners of Congress: The Constitutional and Political Clash over Detainees and the Closure of Guantanamo*, 74 U. PITT. L. REV. 179, 214 (2012) ("[A]t least 30 days prior to the proposed transfer, the Secretary of Defense [must] certif[y] to Congress that the foreign government or entity: (1) is not a designated state sponsor of terrorism or terrorist organization; (2) maintains effective control over each detention facility where a transferred detainee may be housed; (3) is not facing a threat likely to substantially affect its ability to control a transferred detainee; (4) has agreed to take effective steps to ensure that the transferred person does not pose a future threat to the United States, its citizens, or its allies; (5) has agreed to take such steps as the Secretary deems necessary to prevent the detainee from engaging in terrorism; and (6) has agreed to share relevant information with the United States related to the transferred detainee that may affect the security of the United States, its citizens, or its allies.").

[141] *Id.* at 215–16.

[142] *Id.* at 205–06, 217.

[143] *See Donald Trump Says Guantanamo Bay Releases Must End*, BBC NEWS (Jan. 3, 2017), http://www.bbc.com/news/world-us-canada-38502539 [https://perma.cc/FAZ5-NNNA].

[144] Charlie Savage, *Obama Administration Intends to Transfer 17 or 18 Guantánamo Detainees*, N.Y. TIMES (Dec. 19, 2016), http://www.nytimes.com/2016/12/19/us/politics/guantanamo-bay-obama.html [https://perma.cc/2RVS-BHCP] ("Mr. Trump has vowed to keep the prison operating and 'load it up with some bad dudes.").

Guantánamo again, just as President Obama did—and they may be able to look to *Zivotofsky II* for help.

B. Initiation of Hostilities

The distribution of the war power between Congress and the executive branch has fluctuated throughout the nation's history, but *Zivotofsky II* could be used to nudge this balance towards the executive branch. The questions surrounding the allocation of the power to initiate hostilities date back to the Philadelphia Convention in 1787.[145] According to James Madison's notes, Congress was given the power to "declare war" instead of the power to "make war" in order to leave the executive branch the power to repel sudden invasions.[146] As the United States's standing army grew, the executive branch's constitutional war powers relative to those of the legislative branches of government grew in parallel.[147] The first notable expansion of executive war power came in 1846 when James Polk purposely provoked a Mexican military attack by placing the U.S. Army right on the disputed border with Mexico.[148] He then responded in kind, claiming to have been repelling a sudden attack from Mexico.[149] A more dramatic expansion of power came in 1854 when residents of a Nicaraguan town attacked U.S. citizens and damaged U.S. property in the country.[150] Commander George Hollins responded by bombarding the town, setting a new precedent that the executive may unilaterally act to protect U.S. citizens or property abroad rather than simply repelling invasions domestically.[151] Congress responded to this expansion of executive power and the politically unpopular Vietnam War at the time by passing the War Powers Resolution of 1973 (WPR).[152] The statute limited the President's war-making ability in a number of different ways. It required the President to consult with Congress, if at all possible, before sending troops into hostilities.[153] Furthermore, it obligated the President to send a report to Congress within forty-eight hours if he or she engaged in

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[145] *See* Shayana Kadidal, *Does Congress Have the Power to Limit the President's Conduct of Detentions, Interrogations and Surveillance in the Context of War?*, 11 N.Y. CITY L. REV. 23, 27 (2007).

[146] *See id.*; U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have Power . . . To declare War . . . .").

[147] David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 973 (2008).

[148] *See* Ronald J. Sievert, Campbell v. Clinton *and the Continuing Effort to Reassert Congress' Predominant Constitutional Authority to Commence, or Prevent, War*, 105 DICK. L. REV. 157, 161 (2001).

[149] *Id.*

[150] *See* Durand v. Hollins, 8 F. Cas. 111, 111 (C.C.S.D.N.Y. 1860) (No. 4,186).

[151] *Id.*

[152] War Powers Act, 50 U.S.C. §§ 1541–48 (1976); J. Richard Broughton, *What Is It Good for? War Power, Judicial Review, and Constitutional Deliberation*, 54 OKLA. L. REV. 685, 688 (2001).

[153] *See* Carter, *supra* note 96, at 103.

one of three listed scenarios.[154] Lastly, and most importantly, if the aforementioned reporting requirement was triggered, the President had to withdraw deployed troops within sixty days absent the existence of specific circumstances.[155] President Nixon initially vetoed the Act, calling it "clearly unconstitutional," but his veto was overridden by a two-thirds vote in favor of the Act in both the House and the Senate, and passed into law.[156] Rather than openly defy the statute, subsequent presidents have preferred to interpret its provisions creatively in such a way that it did not apply to the specific situation they were facing. For instance, when President Clinton was nearing sixty days with troops entrenched in Kosovo, he interpreted an emergency appropriations act earmarked for the hostilities in Kosovo as congressional authorization.[157] More recently, the Obama Administration defined the 2011 Libya engagement to not constitute "hostilities" within the meaning of the WPR, and thus to not trigger the clock.[158] President Obama contended that the limited mission and low risk of harm to American troops did not bring the engagement within the purview of the WPR.[159] As part of the same Libya engagement, OLC pushed the executive's inherent constitutional powers even further and introduced the modern executive position on war powers.[160] Put simply, the executive may unilaterally take military action if (1) sufficiently important U.S. interests are at stake to trigger the Commander-in-Chief Clause, and (2) the level of military engagement is not sufficient to constitute a "war" within the meaning of Congress' Declare War Clause.[161] The executive branch may view *Zivotofsky II* as finally providing the tools it needs to challenge the constitutionality of the WPR itself rather than avoiding its jurisdiction.

There is plenty of evidence for an inherent executive power to engage in hostilities. The clearest textual evidence of this is the Commander-in-Chief Clause, which grants the President an inherent power over the nation's armed forces.[162] OLC has historically agreed with this reading of the Com-

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[154] *Id.* ("[A]bsent declaration of war, [the President] introduces American forces (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation.").

[155] *See id.* at 103–04 (explaining that this section does not apply if Congress authorizes the use of force, extends the sixty-day window, or "is physically unable to meet as a result of an armed attack upon the United States").

[156] *Id.* at 108.

[157] Authorization for Continuing Hostilities in Kos., 24 Op. O.L.C. 327, 327 (2000).

[158] *See Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 7–40 (2011) (statement of Harold Koh, Legal Adviser, U.S. Dep't of State).

[159] *Id.*

[160] *See* Auth. to Use Military Force in Libya, 35 Op. O.L.C. 1, 6–8 (2011).

[161] *Id.* at 10 (defining "sufficiently important interests" as including "national interests in protecting the lives and property of Americans in the country, preserving 'regional stability,' and maintaining the credibility of United Nations Security Council mandates").

[162] U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .").

mander-in-Chief Clause, claiming the Clause "empower[ed] [the President] to deploy the armed forces abroad without a declaration of war by Congress or other congressional authorization."[163] Also, as mentioned earlier, the Founders specifically reserved to the President the power to repel sudden invasions.[164] Even the Supreme Court has adopted this position in *The Prize Cases*, going so far as to claim that, not only does the President have the power to repel sudden attacks, but that he is obligated to do so.[165] Thus, at minimum, it is clear that the President has some power to initiate hostilities without Congress.

Some think the WPR itself could be used to prove a broader inherent power to initiate hostilities.[166] The very fact that the President is permitted to engage in hostilities for sixty days without congressional authorization presumes some sort of inherent executive power to do so.[167] As the WPR disclaims any intention to "alter the constitutional authority of the Congress or the President," the executive branch must have always possessed this power.[168] OLC has repeatedly stated that it subscribes to this theory.[169] Under this framework, Congress and the President possess concurrent powers to initiate hostilities. Before the sixty-day mark, the President acts in the face of congressional silence—a *Youngstown* Category Two situation. If after the sixty day mark, Congress has not authorized continued hostilities, then the situation moves to one of congressional prohibition where presidential action must give way to a concurrent congressional power under Category Three. The framework laid out in the 2011 OLC opinion regarding hostilities in Libya reached a similar conclusion.[170] If sufficient U.S. interests are implicated, the Commander-in-Chief Clause is triggered and the President may unilaterally engage in hostilities.[171] On the other hand, if the scope of hostilities is broad enough, Congress's Declare War Clause is also triggered and the

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[163] Presidential Power to Use the Armed Forces Abroad without Statutory Authorization, 4A Op. O.L.C. 185, 185 (1980).

[164] *See* Kadidal, *supra* note 145, at 27.

[165] The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.").

[166] *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 463 (2012).

[167] *Id.*

[168] 50 U.S.C. § 1547(d).

[169] *See, e.g.*, Deployment of U.S. Armed Forces into Haiti, 18 Op. O.L.C. 173, 176 (1994) ("To be sure, the WPR declares that it should not be 'construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances.' 50 U.S.C. § 1547(d)(2). But just as clearly, the WPR *assumes* that the President already has such authority. . . .") (emphasis in original); Auth. to Use Military Force in Libya, 35 Op. O.L.C. 1, 8 (2011) ("Indeed, Congress itself has implicitly recognized this presidential authority.").

[170] *See* Auth. to Use Military Force in Libya, 35 Op. O.L.C. 1, 6–8 (2011).

[171] *Id.*

executive branch must yield to a concurrent congressional power.[172] To overcome this, an exclusive power to initiate hostilities would be needed.

There is a history of past Presidents denying the constitutionality of the WPR, at least with respect to certain provisions. This has left the door open for an exclusive presidential power to initiate hostilities. When President Reagan deployed troops to Lebanon in 1982, he followed the WPR's reporting requirement and consulted with Congress.[173] But at the same time, he claimed inherent authority to deploy troops under his constitutional powers as President and as Commander-in-Chief, while making it clear that he did not require congressional authorization to do so.[174] In 1991, while George H.W. Bush was awaiting congressional authorization for the Gulf War, he commented that he did not necessarily need this approval and that he had the constitutional authority to go ahead without it.[175]

Post-*Zivotofsky II*, the Executive Branch can point to a litany of arguments about the functional importance of exclusive power. For example, in the world of military action, decisiveness is key; it is arguably imperative that the United States responds to threats without delay. In some situations, there might not be time to wait for congressional action. Speaking with one voice is another crucial consideration. The United States's allies need to know with certainty on which side the United States stands during a military conflict. Lastly, secrecy is important to keep hostile parties from finding out about crucial strategic decisions and battle plans, especially in the case of an initial attack. It is much easier to keep this information from leaking to the enemy without having to inform hundreds of congressmen prior to acting. Various OLC opinions have reiterated these and other functional considerations that strongly push towards an exclusive presidential power in this area. They point to the fact that the executive holds an "implicit advantage" in "situations calling for immediate action."[176] This is especially true in today's world as "imminent national security threats and rapidly evolving military and diplomatic circumstances may require a swift response by the United States without the opportunity for congressional deliberation and action."[177] As to the specific question of the WPR, President Reagan explained that the sixty-day deadline "can undermine foreign policy judgments, adversely affect our ability to deploy United States Armed Forces in support of these

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[172] *Id.*

[173] John R. Crook, *The War Powers Resolution—A Dim and Fading Legacy*, 45 CASE W. RES. J. INT'L L. 157, 161 (2012).

[174] Presidential Statement on Signing the Multinational Force in Leb. Resolution, 2 PUB. PAPERS 1444–45 (Oct. 12, 1983).

[175] George W. Bush, President of the U.S., The President's News Conference on the Persian Gulf Crisis (Jan. 9, 1991) ("I don't think I need it. I think Secretary Cheney expressed it very well the other day. There are different opinions on either side of this question, but Saddam Hussein should be under no question on this: . . . I still feel that I have the constitutional authority—many attorneys having so advised me.").

[176] Presidential Power to Use the Armed Forces Abroad without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980).

[177] Auth. to Use Military Force in Libya, 35 Op. O.L.C. 1, 7 (2011).

judgments, and encourage hostile elements to maximize U.S. casualties in connection with such deployments."[178]

Although the above line of thought has some basis, there are multiple functional considerations that could support a finding of concurrent congressional power as well. For instance, the decision to embroil the nation in a conflict is a weighty one—congressional involvement would ensure that a branch controlled by one person is not making this decision alone. Also, the fact that Congress acts slowly could be a benefit in the context of war. This provides time to gather all relevant information needed to make a decision, and more importantly, it allows tensions to subside and cooler heads to prevail. But this is what makes *Zivotofsky II* such dangerous precedent; it is written with a view towards establishing what powers the executive branch possesses. Functional considerations that could cut against such a power are not considered in the opinion. Under *Zivotofsky II*, the combination of history, precedent, text, and most importantly, functional considerations presented here can point towards the existence of an exclusive executive power to initiate hostilities.

As a potential limitation in keeping with OLC's framework, sufficient U.S. interests have to be implicated for this exclusive executive power to be invoked.[179] And OLC has already conceded the constitutionality of certain parts of the WPR, with the most notable example being the sixty-day clock.[180] Any future claim to an exclusive power to initiate hostilities would either have to overrule this precedent or work around it. For instance, OLC could still directly challenge the ability of Congress to demand an end to hostilities by concurrent resolution. In fact, it has already done so in the past, albeit on different grounds.[181] An exclusive executive power could then potentially provide the military a sixty-day window to accomplish its objectives.

The Constitution's clear grants of war powers to Congress provide a potential backstop. Article I contains a variety of specific war powers over which it would be difficult for the executive branch to claim exclusivity.[182]

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[178] Presidential Statement on Signing the Multinational Force in Leb. Resolution, 2 PUB. PAPERS 1444–45 (Oct. 12, 1983).

[179] Auth. to Use Military Force in Libya, 35 Op. O.L.C. 1, 7 (2011).

[180] Presidential Power to Use the Armed Forces Abroad without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980) ("We believe that Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by the provisions of §1544(b) of the Resolution.").

[181] *Id.* ("We do not believe that Congress may, on a case-by-case basis, require the removal of our armed forces by passage of a concurrent resolution which is not submitted to the President for his approval or disapproval pursuant to Article I, § 7 of the Constitution.").

[182] *See, e.g.*, U.S. CONST. art. I, § 8, cl. 1 ("Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."); *id.* cl. 10 ("[Power] . . . [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . ."); *id.* cl. 11 ("[Power] . . . [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . . ."); *id.* cl. 12 ("[Power] . . . [t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . . ."); *id.* cl. 13 ("[Power] . . . [t]o provide and maintain a Navy . . . ."); *id.* cl. 14

However, the existence of these clauses is not necessarily mutually exclusive with an executive branch power to initiate hostilities. Aside from the Declare War Clause, nothing in Article I clearly conflicts with this executive claim. Many of the war powers Congress explicitly possesses allow it to regulate specific acts during war, such as granting letters of marque and reprisal or making rules concerning captures.[183] The others allow Congress to regulate the general organization and funding of the army, such as the power to collect taxes for the common defense.[184] As for the Declare War Clause, many think that it had a specific intent that does not hold as much meaning today as it did during the Founding era. It referred to a formal, declared war that triggered international law obligations.[185] The Supreme Court, in *Bas v. Tingy*,[186] clarified that an "imperfect war" may exist, even without a formal declaration of war.[187] In other words, the Supreme Court believed that the United States could be at war without Congress officially triggering it via the Declare War Clause.[188] So rare is a declaration of war that it has only happened five times in U.S. history,[189] and only encompassed ten of the 118 recognized wars worldwide between 1700 and 1872.[190] The U.N. Charter eliminated this distinction between declared and undeclared wars altogether—certain criteria were created that dictate when it is appropriate for a state to use force at all, regardless of whether it constitutes a "declared" or

("[Power] . . . [t]o make Rules for the Government and Regulation of the land and naval Forces . . . ."); *id.* cl. 15 ("[Power] . . . [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . ."); *id.* cl. 16 ("[Power] . . . [t]o provide for organizing, arming, and disciplining, the Militia . . . .").

[183] *See* U.S. CONST. art. I, § 8, cl. 10 ("[Power] . . . [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . ."); *id.* cl. 11 ("[Power] . . . [t]o grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . . ."); *id.* cl. 16 ("[Power] . . . [t]o provide for organizing, arming, and disciplining, the Militia . . . .").

[184] *See* U.S. CONST. art. I, § 8, cl. 1 ("Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."); *id.* cl. 12 ("[Power] . . . [t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . . ."); *id.* cl. 13 ("[Power] . . . [t]o provide and maintain a Navy . . . ."); *id.* cl. 14 ("[Power] . . . [t]o make Rules for the Government and Regulation of the land and naval Forces . . . ."); *id.* cl. 15 ("[Power] . . . [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . ."); *id.* cl. 16 ("[Power] . . . [t]o provide for organizing, arming, and disciplining, the Militia . . . .").

[185] John Alan Cohan, *Legal War: When Does It Exist, and When Does It End?*, 27 HASTINGS INT'L & COMP. L. REV. 221, 226 (2004).

[186] 4 U.S. 37, 40 (1800).

[187] *See id.* ("[H]ostilities may subsist between two nations more confined in its nature and extent . . . and this is more properly termed imperfect war . . . Still, however, it is public war, because it is an external contention by force, between some of the members of the two nations, authorised by the legitimate powers.").

[188] *Id.* at 41 ("[A] war of the imperfect kind, is more properly called acts of hostility, or reprizal, and that congress did not mean to consider the hostility subsisting between France and the United States, as constituting a state of war.").

[189] Cohan, *supra* note 185, at 243–44 (explaining that the five wars were the War of 1812, the Mexican American War of 1846, the Spanish-American War of 1898, World War I, and World War II).

[190] *Id.* at 239.

"undeclared" war.[191] This put an end to the only reason a nation would ever officially declare a war: to trigger international law protections. With this history, there is a persuasive argument that the Declare War Clause stands as a vestige of a bygone era. Consequently, it cannot be said to definitively preclude an exclusive executive power to engage in hostilities. And, as with detention decisions, a constitutional question sufficient to invoke the avoidance canon may be raised through these arguments.

Regardless of the Declare War Clause's present-day relevance, however, Congress could still make a textual argument by pointing to the Necessary and Proper Clause. The Supreme Court has construed this clause to permit Congress "to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government," with the caveat that these measures be "within the scope of the constitution [sic]."[192] Even in *Zivotofsky II*, Scalia's dissent admonished the majority for overlooking Congress's incidental power to make "grants of citizenship "effectual" by providing for the issuance of certificates authenticating them."[193] In the context of war, it is plausible that Congress would have the ability to initiate hostilities incidental to its power to issue a formal declaration of war. If this were the case, the power to initiate hostilities would be concurrent at the very least. Under the *Youngstown* framework, the executive branch would have to yield to congressional legislation in this situation. Given the dangers of an unchecked executive power to initiate hostilities, opponents should argue that this is the better reading of constitutional text.

C. Surveillance

Although surveillance has not been an area of conflict between the political branches since the FISA Amendments Act (FAA) were passed, *Zivotofsky II* could be used by the executive if a future Congress attempts to circumscribe the executive branch's power in this area, or to justify independent powers being exercised in the absence of Congress.[194] Historical practice could bolster an argument for exclusive power. For a long time, surveillance was an area entirely governed by the executive branch. In the early 1800s, President Jefferson exercised a broad range of surveillance powers without specific authorization from Congress.[195] Successive presidents followed this model and made use of intelligence as necessary.[196] Congress funded executive surveillance without asking any questions and

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[191] Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus Ad Bellum and Jus In Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 67 (2009).

[192] *McCulloch v. Maryland*, 17 U.S. 316, 420 (1819).

[193] Zivotofsky *ex rel.* Zivotofsky v. Kerry (Zivotofsky II), 135 S. Ct. 2076, 2117 (2015) (Scalia, J., dissenting).

[194] *See* Owen Fiss, *Even in a Time of Terror*, 31 YALE L. & POL'Y REV. 1, 9–11 (2012).

[195] *See* William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 16 (2000).

[196] *See id.* at 17.

without attempting to place restrictions on this power.[197] Foreign intelligence remained a purely executive domain for hundreds of years but this came to a halt in 1978. In the midst of warrantless surveillance concerns, Congress enacted the Foreign Intelligence Surveillance Act (FISA).[198] Principally, the executive branch was still allowed to conduct surveillance within the United States where the target was a foreign power or the agent of a foreign power, provided the Foreign Intelligence Surveillance Court (FISC) approved.[199] This was a sharp break from the prior practice of unilateral executive surveillance power. Nevertheless, it still left unregulated the vast space of surveillance within a foreign country, even of U.S. persons.[200] Ronald Reagan issued Executive Order 12,333 in 1982 to impose standards by which surveillance within a foreign country that FISA did not reach should be governed.[201]

Although the prospect of an inherent executive surveillance power would have been uncontroversial for much of the nation's history, this has changed drastically since the attacks of September 11, 2001.[202] With the specter of terrorism hanging over its head, the Bush Administration began conducting wireless foreign surveillance within the United States without a FISA warrant.[203] This so-called Terrorist Surveillance Program (TSP) was brought to light through a *New York Times* article in 2005.[204] The Administration mainly defended the program by claiming the 2001 Authorization to Use Military Force (AUMF) gave it the authority to conduct such surveillance.[205] Eventually, Congress granted the executive branch the bulk of the powers it was exercising through the TSP with the 2008 FAA.[206] In essence, it permitted the Attorney General and the Director of National Intelligence to authorize surveillance (pursuant to FISC certification) of "persons reasonably believed to be located outside the United States to acquire foreign intelligence information" for up to a year.[207] As can be seen, it loosened the FISA requirement that the targeted person be an "agent of a foreign power."[208] However, it also introduced new constraints in other areas, such as protections for U.S. persons located abroad.[209] Under the *Youngstown* framework, Congress pushed the Bush Administration's activities under the TSP from

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[197] *See id.* at 76.
[198] *Id.*
[199] *Id.* at 80–82.
[200] *See* Jonathan W. Gannon, *From Executive Order to Judicial Approval: Tracing the History of Surveillance of U.S. Persons Abroad in Light of Recent Terrorism Investigations*, 6 J. NAT'L SEC. L. & POL'Y 59, 69 (2012).
[201] *See id.* at 73.
[202] *See* Blum, *supra* note 99, at 283.
[203] *Id.* at 283.
[204] *See id.* at 284.
[205] *Id.* at 285–86.
[206] *See id.* at 297.
[207] 50 U.S.C. § 1881a(a) (2008); Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008; Blum, *supra* note 99, at 287.
[208] Blum, *supra* note 99, at 299.
[209] *See id.* at 299–300.

Category Three action in defiance of FISA to Category One action authorized by the FAA.

As the FAA confers such broad powers on the executive branch, it is difficult to see why the President would need to invoke an exclusive surveillance power. One possible situation in which this would arise is if Congress enacts legislation that rolls back some of the powers granted in the FAA. Public opinion on surveillance has soured since Edward Snowden leaked information on the existence of sweeping metadata collection programs operating pursuant to the FAA.[210] Given the current political climate, it is plausible that Congress would seek to placate its constituents through increased restrictions on executive surveillance. In fact, this process has already begun with the FREEDOM Act Amendment to the PATRIOT Act; it imposed stronger limitations and tighter definitions of statutory terms to constrain executive surveillance.[211] Furthermore, two of the most controversial FAA provisions, Sections 215 and 702, are scheduled to sunset in 2017.[212] If political pressure continues to escalate, Congress may decide not to renew the provisions, or to heavily modify them.

Zivotofsky II could also help the executive branch support its unilateral surveillance programs under Executive Order 12,333 should they come under scrutiny. For instance, the President's transit authority has always existed in a murky legal territory—many believe that it should have been regulated by FISA, and now by the FAA.[213] Transit authority refers to the interception of communications going from one foreign country to another foreign country, but passing through the United States.[214] Despite the fact that the information is intercepted domestically, the Reagan Administration decided it was foreign-to-foreign communication that fell within the scope of Executive Order 12,333 and not FISA.[215] Lastly, the Bush Administration made two changes to their foreign surveillance operations under Executive Order 12,333 that could come under attack. One was to allow the collection of metadata through the mechanism of chaining contacts even if the chain hits an American link.[216] The other permitted the NSA to share information gathered from these programs with other agencies.[217]

The Supreme Court has also come out in favor of an inherent power in this area. In *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, the Court examined the reviewability of an agency order that required Presiden-

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[210] *See* Stephen I. Vladeck, *Big Data before and after Snowden*, 7 J. NAT'L SEC. L. & POL'Y 333, 334 (2014) (noting that some of the most well-known programs were "the PRISM program under section 702, and the bulk telephone metadata program under section 215 of the USA PATRIOT Act").

[211] *See* Ombres, *supra* note 100, at 46–48.

[212] *See* Alan Butler, *Standing up to Clapper: How to Increase Transparency and Oversight of FISA Surveillance*, 48 NEW ENG. L. REV. 55, 86 (2013).

[213] *See* CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY 175 (2015).

[214] *See id.* at 173–74.

[215] *See id.*

[216] *See id.*

[217] *Id.*

tial approval.[218] The President granted approval with the condition that certain parts of the order be amended for reasons related to national welfare.[219] The Court reached the conclusion that the President need not reveal the specifics of his reasoning as that could infringe on his intelligence authority.[220] Supreme Court support is even more explicit in *Totten v. United States,* a case about a Civil War-era spy suing the government for payment.[221] While the holding did not turn on it, the Court found that President Lincoln had full authority to contract with such spies pursuant to his surveillance powers.[222] Executive branch correspondences evince this understanding as well. In a memorandum to his Attorney General, President Roosevelt granted him the power to conduct intelligence operations with broad discretion on when and how to do so.[223] As Roosevelt did not seek statutory authorization to do this, he must have thought he had an inherent surveillance power. Several years later, Attorney General Tom Clark reiterated this command in a memorandum approved by President Truman.[224] In light of the plethora of evidence, there seems to be an inherent executive surveillance power that has been developed and reinforced over many presidencies.

More problematically, functional considerations can be argued to be evidence of an exclusive surveillance power. Without an exclusive power, the President may have been acting because of congressional acquiescence prior to FISA, a Category One situation. *Zivotofsky II* could give the executive branch room to act unilaterally in surveillance, and without the checks and balances contemplated by the Constitution. The main functional consideration in the field of surveillance is secrecy. Intelligence is only useful if the target is unaware they are being watched. The executive branch is simply in a better position to maintain this secrecy given its hierarchical and less dispersed structure. Furthermore, the government must be able to act quickly in the field of surveillance. Often, targets are being monitored because they are planning, or have a high risk of planning, an attack on U.S. property or persons. Intelligence personnel must be able to conduct surveillance of these targets in a timely fashion and before they are able to attack. Thus, there is a need for flexibility and decisiveness in this area, a task better suited to the executive branch. On the other hand, Congress is a more deliberative entity

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[218] *See* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 104 (1948).

[219] *See id.* at 111.

[220] *See id.* ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.").

[221] 92 U.S. 105, 105–06 (1875).

[222] *See id.* at 106 ("We have no difficulty at to the authority of the President in the matter. He was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy . . . .").

[223] *See* Legal Authorities Supporting the Activities of the Nat'l Sec. Agency Described by the President, 30 Op. O.L.C. 1, 7 (2006).

[224] *See id.* at 8.

given its large body of members. With the advances in surveillance since the early days of the nation, intelligence now has the potential to intrude on individual rights in a way it did not before. So it may be better to have a more considered decision on whether or not to employ surveillance and if so, in what capacity. Relatedly, while secrecy is certainly paramount in intelligence gathering, it is also the same consideration that led to abusive programs like the TSP. As Congress can only act through legislation, it is difficult for it to do anything without being held accountable. Perhaps the benefits of this accountability outweigh the costs of a loss of secrecy. With persuasive arguments on both sides of the debate, it was not difficult for The Department of Justice (DOJ) to advance plausible pro-executive considerations to defend the TSP.[225] Interestingly, the DOJ was not necessarily arguing for an exclusive executive surveillance power in defending the TSP. It claimed there was an inherent surveillance power, but that it may be concurrent with Congress's surveillance power.[226] To move from this state of affairs to a *Youngstown* Category One situation, the DOJ suggested the 2001 AUMF provided sufficient statutory authorization.[227] With *Zivotofsky II* as a blueprint for sustaining presidential action in category three, it may have been possible to also argue that there was no need to move to Category One at all. And as always, the canon of constitutional avoidance is an available strategy.

Although not directly relevant to the separation of powers, the Fourth Amendment serves as an independent check on the executive branch's surveillance power.[228] However, given the difficulties of justiciability, it may be up to Congress to enforce these Fourth Amendment protections through legislation. Generally, surveillance conducted pursuant to a FISA warrant does not create Fourth Amendment problems.[229] However, various warrantless wiretapping programs operated by the executive branch over the years, such as the TSP and intelligence gathering operations under Section 702 of the FAA, are more problematic. As lawsuits against these programs are usually dismissed for lack of standing, the Court has not ruled on their constitutionality. The Sixth Circuit dismissed a lawsuit by the American Civil Liberties

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[225] *See id.* at 45–46 ("The Executive requires a greater degree of flexibility in this field to respond with speed and absolute secrecy to the ever-changing array of foreign threats faced by the Nation. . . . The NSA activities are designed to enable the Government to act quickly and flexibly (and with secrecy) to find agents of al Qaeda and its affiliates—an international terrorist group which has already demonstrated a capability to infiltrate American communities without being detected—in time to disrupt future terrorist attacks against the United States.").

[226] *See id.* at 11.

[227] *See id.*

[228] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[229] *See* L. Rush Atkinson, *The Fourth Amendment's National Security Exception: Its History and Limits*, 66 VAND. L. REV. 1343, 1398 (2013).

Union challenging the Bush Administration's TSP program for this reason.[230] A suit against Section 702 was also dismissed for a lack of standing as the Court believed the injury claimed by the plaintiffs was "too speculative."[231] This makes surveillance a perfect example of why we need strong inter-branch checks and balances. With the judiciary unable to act, it is either up to Congress to place sufficient restraints on the executive branch to satisfy Fourth Amendment concerns, or up to the executive branch itself to implement procedures minimizing such concerns.[232]

VII. The Dangers of *Zivotofsky II*

So far, this article has discussed how the executive branch *could* use *Zivotofsky II* going forward, but not whether it *should*. While it may be tempting for a presidential administration to implement its agenda in the face of a recalcitrant Congress, it should consider the potential of *Zivotofsky II* to erode the separation of powers. James Madison believed a country of separated powers was essential to preserve liberty—a notion that is just as true today as it was when the Constitution was drafted.[233] Nowhere is this truer than in national security; in spite of the best intentions, security can go too far and begin to corrode individual freedom. If all national security power is concentrated in one branch, it becomes much harder for the other branches to check abuses of power. The dangers of aggrandizing congressional power in national security may not be readily apparent for a long time either. One can imagine a benevolent executive branch consolidating power for the good of the people. For example, a presidential administration could cite *Zivotofsky II* to shut down Guantánamo. But once a precedent has been set, it is very difficult to rein it in. Subsequent administrations with less noble goals would have the same power to act unilaterally, perhaps to the detriment of the nation. It does not require too much effort to imagine a President using the power to initiate hostilities to envelop the nation in unnecessary wars. In the short term, the separation of powers may work against the common good, but in the long run, individual liberty depends on it.

To prevent future abuses, OLC should disclaim any prospect of using *Zivotofsky II* to aggrandize the executive branch's national security powers. Through official memoranda, it can establish clear boundaries between the

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[230] *See* ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 675 (2007) ("Because the plaintiffs cannot demonstrate that the alleged violation of the Separation of Powers has caused their injury, they lack standing to litigate their separation-of-powers claim. It is therefore not necessary to address redressability, the third element of standing.").

[231] *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1143 (2013) ("But respondents' theory of future injury is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.' . . . We therefore hold that respondents lack Article III standing.").

[232] For a discussion on why the Court should recognize surveillance activities as a harm for the purposes of standing, see Neil M. Richards, *The Dangers of Surveillance*, 126 Harv. L. Rev. 1934, 1963 (2013).

[233] *See* The Federalist No. 51, 347 (James Madison).

national security powers of each branch and constrain future administrations. While this maneuver cannot definitively ensure no future president will use *Zivotofsky II* maliciously, it would be difficult to claim an exclusive executive power where contradictory executive precedent exists. A similar situation took place when Acting Assistant Attorney General for the Office of Legal Counsel, Steven Bradbury, issued a memorandum repudiating a series of OLC precedent issued in the wake of the September 11 attacks.[234] He rejected the precedent's broad theory of executive power and reaffirmed Congress's many constitutional war powers.[235]

In the event that the executive branch attempts to use *Zivotofsky II* in a Category Two or Three situation, some defensive mechanisms exist. Opponents could argue that *Zivotofsky II* should be restricted to its facts, an idea that Justice Kennedy himself raises in the majority opinion.[236] Although it is true that precedent has a way of taking on a life of its own, that the majority opinion proclaimed the case should not be extended to other situations certainly helps here. *Bush v. Gore* presented an analogous situation; the Court put forward a novel interpretation of the Equal Protection Clause[237] while attempting to limit its precedential value.[238] Despite fears from commentators that the case would dramatically expand Equal Protection doctrine,[239] thus far it has mostly been ignored as precedent.[240] Admittedly, *Zivotofsky II* is different as the danger lies in the executive branch citing it as precedent, and not in the judiciary itself. OLC may not feel as bound by the Court's proclamation that the case should not be used as precedent. To strengthen this argument, opponents should push for the Court to more clearly confine *Zivotofsky II* to its facts in subsequent cases. Advocates would do well to point out the opinion's one-sided examination of text, history, precedent, and functional considerations as a reason for not extending the case any further.

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[234] Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, at 1 (Jan. 15, 2009) ("The President certainly has significant constitutional powers in this area, but the assertion in these opinions that Congress has no authority under the Constitution to address these matters by statute does not reflect the current views of OLC and has been overtaken by subsequent decisions of the Supreme Court and by legislation passed by Congress and supported by the President.").

[235] *Id.* at 4 ("At the same time. Article I, Section 8 of the Constitution also grants significant war powers to Congress.").

[236] *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry (Zivotofsky II), 135 S. Ct. 2076, 2096 (2015).

[237] *See* Jack M. Balkin, Bush v. Gore *and the Boundary between Law and Politics*, 110 YALE L.J. 1407, 1427 (2001) (arguing that the Court's equal protection analysis in *Bush v. Gore* sharply departs from precedent).

[238] *See* Bush v. Gore, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

[239] *See* Balkin, *supra* note 237, at 1445.

[240] Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore*: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1419 (2016) ("By design, the decision had virtually no precedential value and has been cited just once in more than fifteen years by the Court itself, even then only in a dissenting footnote.").

Although it may be difficult to find a plaintiff with standing for a separation of powers dispute, *Zivotofsky II* itself is proof that there are some cases in which this is possible. OLC would be hard-pressed to completely ignore precedent cutting against its claim to an exclusive power. At the very least, it would weaken potential *Zivotofsky II* arguments.

VIII. Conclusion

Zivotofsky II has provided the executive branch with a path to take unilateral action in the face of congressional opposition. Whether the executive branch accepts this invitation remains to be seen. While it may not happen immediately, the precedent will sit there like a "loaded weapon," ready to be wielded whenever it is needed.[241] Even though it is impossible to conclusively say how or where this precedent will be used, there are a couple of likely candidates. It will be most tempting to use *Zivotofsky II* to support an exclusive executive power in areas where the constitutional balance of powers remains unclear and in which functional considerations counsel towards such a power. Consequently, national security and war powers seem like strong possibilities. More specifically, the areas of detention, initiation of hostilities, and surveillance are prime candidates for the executive branch to stake its claim to an exclusive power, now with the help of *Zivotofsky II*. However, to preserve the separation of powers, this decision should be confined to its facts. For as Justice Jackson warned, if we open the Pandora's Box of executive power, "[n]o one, perhaps not even the President, knows the limits of the power he may seek to exert."[242]

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[241] Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

[242] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).