Executive Power: Theory of the Presidential Office

The most obvious meaning of the language of Article II, § 1, is to confirm that the executive power is vested in a single person, but almost from the beginning it has been contended that the words mean much more than this simple designation of locus. Indeed, contention with regard to this language reflects the much larger debate about the nature of the Presidency. With Justice Jackson, we "may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other."14 At the least, it is no doubt true that the "loose and general expressions" by which the powers and duties of the executive branch are denominated15 place the President in a position in which he, as Professor Woodrow Wilson noted, "has the right, in law and conscience, to be as big a man as he can" and in which "only his capacity will set the limit."16

Hamilton and Madison.

Hamilton's defense of President Wash- ington's issuance of a neutrality proclamation upon the outbreak of war between France and Great Britain contains not only the lines but most of the content of the argument that Article II vests significant powers in the President as possessor of executive powers not enumerated in subsequent sections of Article II.17 Hamilton wrote: "The second article of the Constitution of the United States, section first, establishes this general proposition, that 'the Executive Power shall be vested in a President of the United States of America.' The same article, in a succeeding section, proceeds to delineate particular cases of executive power. It declares, among other things, that 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; that he shall have power, by and with the advice and consent of the senate, to make treaties; that it shall be his duty to receive ambassadors and other public ministers, *and to take care that the laws be faithfully executed*. It would not consist with the rules of sound construction, to consider this

enumeration of particular authorities as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations; as in regard to the co-operation of the senate in the appointment of officers, and the making of treaties; which are plainly qualifications of the general executive powers of appointing officers and making treaties."

"The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. In the article which gives the legislative powers of the government, the expressions are, 'All legislative powers herein granted shall be vested in a Congress of the United States.' In that which grants the executive power, the expressions are, 'The *executive power* shall be vested in a President of the United States.' The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government. The general doctrine of our Constitution then is, that the *executive power* of the nation is vested in the President; subject only to the *exceptions* and *qualifications*, which are expressed in the instrument."[18]

Madison's reply to Hamilton, in five closely reasoned articles,[19] was almost exclusively directed to Hamilton's development of the contention from the quoted language that the conduct of foreign relations was in its nature an executive function and that the powers vested in Congress which bore on this function, such as the power to declare war, did not diminish the discretion of the President in the exercise of his powers. Madison's principal reliance was on the vesting of the power to declare war in Congress, thus making it a legislative function rather than an executive one, combined with the argument that possession of the exclusive power carried with it the exclusive right to judgment about the obligations to go to war or to stay at peace, negating the power of the President to proclaim the nation's neutrality. Implicit in the argument was the rejection of the view that the first section of Article II bestowed powers not vested in subsequent sections. "Were it once established that the powers of war and treaty are in their nature executive; that so far as they are not by strict construction transferred to the legislature, they actually belong to the executive; that of course all powers not less executive in their nature than those powers, if not granted to the legislature, may be claimed by the executive; if granted, are to be taken strictly, with a residuary right in the

executive; or . . . perhaps claimed as a concurrent right by the executive; and no citizen could any longer guess at the character of the government under which he lives; the most penetrating jurist would be unable to scan the extent of constructive prerogative."[20] The arguments are today pursued with as great fervor, as great learning, and with two hundred years experience, but the constitutional part of the contentiousness still settles upon the reading of the vesting clauses of Articles I, II, and III.[21]

The Myers Case.

However much the two arguments are still subject to dispute, Chief Justice Taft, himself a former President, appears in *Myers v. United States*[22] to have carried a majority of the Court with him in establishing the Hamiltonian conception as official doctrine. That case confirmed one reading of the "Decision of 1789" in holding the removal power to be constitutionally vested in the President.[23] But its importance here lies in its interpretation of the first section of Article II. That language was read, with extensive quotation from Hamilton and from Madison on the removal power, as vesting all executive power in the President, the subsequent language was read as merely particularizing some of this power, and consequently the powers vested in Congress were read as exceptions which must be strictly construed in favor of powers retained by the President.[24] *Myers* remains the fountainhead of the latitudinarian constructionists of presidential power, but its *dicta*, with regard to the removal power, were first circumscribed in *Humphrey's Executor v. United States*,[25] and then considerably altered in *Morrison v. Olson*;[26] with regard to the President's "inherent" powers, the *Myers* dicta were called into considerable question by *Youngstown Sheet & Tube Co. v. Sawyer*.[27]

The Curtiss-Wright Case.

Further Court support of the Hamiltonian view was advanced in *United States v. Curtiss-Wright Export Corp.*,[28] in which Justice Sutherland posited the doctrine that the power of the National Government in foreign relations is not one of enumerated powers, but rather is inherent. The doctrine was then combined with Hamilton's contention that control of foreign relations is exclusively an executive function with obvious implications for the power of the President. The case arose as a challenge to the delegation of power from Congress to the President with regard to a foreign relations matter. Justice Sutherland denied that the limitations on delegation in the domestic field were at all relevant in foreign affairs:

“The broad statement that the Federal Government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. . . . That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. . . .”

“As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. . . .”

“It results that the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have been vested in the Federal Government as necessary concomitants of nationality. . . .”

“Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.”29

Scholarly criticism of Justice Sutherland’s reasoning has demonstrated that his essential postulate, the passing of sovereignty in external affairs directly from the British Crown to the colonies as a collective unit, is in error.30 Dicta in later cases controvert the conclusions drawn in *Curtiss-Wright* about the foreign relations power being inherent rather than subject to the limitations of the delegated powers doctrine.31 The holding in *Kent v. Dulles*32 that delegation to the Executive of discretion in the issuance of passports must be measured by the usual standards applied in domestic delegations appeared to circumscribe Justice Sutherland’s more expansive view, but the subsequent limitation of that decision, though formally reasoned within its analytical framework,

coupled with language addressed to the President's authority in foreign affairs, leaves clouded the vitality of that decision.33 The case nonetheless remains with *Myers v. United States* the source and support of those contending for broad inherent executive powers.34

The Youngstown Case.

The first case in the post-World War II era to consider extensively the "inherent" powers of the President, or the issue of what executive powers are vested by the first section of Article II, was *Youngstown Sheet & Tube Co. v. Sawyer*,35 but its multiple opinions did not reflect a uniform understanding of these matters. During the Korean War, President Truman seized the steel industry, then in the throes of a strike. No statute authorized the seizure, and the Solicitor General defended the action as an exercise of the President's executive powers that were conveyed by the first section of Article II, by the obligation to enforce the laws, and by the vesting of the function of commander-in-chief. By vote of six-to-three, the Court rejected this argument and held the seizure void. But the doctrinal problem is complicated by the fact that Congress had expressly rejected seizure proposals in considering labor legislation and had authorized procedures not followed by the President that did not include seizure. Thus, four of the majority Justices36 appear to have been decisively influenced by the fact that Congress had denied the power claimed and that this in an area in which the Constitution vested the power to decide at least concurrently if not exclusively in Congress. Three and perhaps four Justices37 appear to have rejected the government's argument on the merits while three38 accepted it in large measure. Despite the inconclusiveness of the opinions, it seems clear that the result was a substantial retreat from the proclamation of vast presidential powers made in *Myers* and *Curtiss-Wright*.39

The Zivotofsky Case.

The Supreme Court's decision in *Zivotofsky v. Kerry* appears to be the first instance in which the Court held that an act of Congress unconstitutionally infringed upon a foreign affairs power of the President.40 The case concerned a legislative enactment requiring the Secretary of State to identity a Jerusalem-born U.S. citizen's place of birth as "Israel" on his passport if requested by the citizen or his legal guardian.41 The State Department had declined to follow this statutory command, citing longstanding executive policy of declining to recognize any country's sovereignty over the city of Jerusalem.42 It argued the statute impermissibly intruded upon the President's constitutional authority over the recognition of foreign nations and their territorial

bounds, and attempted to compel "the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns."[43]

The *Zivotofsky* Court evaluated the permissibility of the State Department's non-adherence to a statutory command using the framework established by Justice Jackson's concurring opinion in *Youngstown*, under which executive action taken in contravention of a legislative enactment will only be sustained if the President's asserted power is both "exclusive" and "conclusive" on the matter.[44] The Constitution does not specifically identify the recognition of foreign governments among either Congress's or the President's enumerated powers. But in an opinion that employed multiple modes of constitutional interpretation, the Court concluded that the Constitution not only conferred recognition power to the President, but also that this power was not shared with Congress.

The Court's analysis of recognition began with an examination of "the text and structure of the Constitution," which it construed as reflecting the Founders' understanding that the recognition power was exercised by the President.[45] Much of the Court's discussion of the textual basis for the recognition power focused on the President's responsibility under the Reception Clause to "receive Ambassadors and other public Ministers."[46] At the time of the founding, the Court reasoned, receiving ambassadors of a foreign government was tantamount to recognizing the foreign entity's sovereign claims, and it was logical to infer "a Clause directing the President alone to receive ambassadors" as "being understood to acknowledge his power to recognize other nations."[47] In addition to the Reception Clause, the *Zivotofsky* Court identified additional Article II provisions as providing support for the inference that the President retains the recognition power,[48] including the President's power to "make Treaties" with the advice and consent of the Senate,[49] and to appoint ambassadors and other ministers and consuls with Senate approval.[50]

The *Zivotofsky* Court emphasized "functional considerations" supporting the Executive's claims of exclusive authority over recognition,[51] stating that recognition is a matter on which the United States must "speak with . . . one voice,"[52] and the executive branch is better suited than Congress to exercise this power for several reasons, including its "characteristic of unity at all times," as well as its ability to engage in "delicate and often secret diplomatic contacts that may lead to a decision on recognition" and "take the decisive, unequivocal action necessary to recognize other states at international law."[53]

The Court also concluded that historical practice and prior jurisprudence gave credence to the President's unilateral exercise of the recognition power. Here, the Court

acknowledged that the historical record did not provide unequivocal support for this view, but characterized "the weight" of historical evidence as reflecting an understanding that the President's power over recognition is exclusive.54 Although the Executive had consistently claimed unilateral recognition authority from the Washington Administration onward, and Congress had generally acquiesced to the President's exercise of such authority, there were instances in which Congress also played a role in matters of recognition. But the *Zivotofsky* Court observed that in all earlier instances, congressional action was consistent with, and deferential to, the President's recognition policy, and the Court characterized prior congressional involvement as indicating "no more than that some Presidents have chosen to cooperate with Congress, not that Congress itself has exercised the recognition power."55 The Court also stated that a "fair reading" of its prior jurisprudence demonstrated a longstanding understanding of the recognition power as an executive function, notwithstanding "some isolated statements" in those cases that might have suggested a congressional role.56

Having determined that the Constitution assigns the President with exclusive authority over recognition of foreign sovereigns, the *Zivotofsky* Court ruled that the statutory directive that the State Department honor passport requests of Jerusalem-born U.S. citizens to have their birthplace identified as "Israel" was an impermissible intrusion on the President's recognition authority. According to the Court, Congress's authority to regulate the issuance of passports, though wide in scope, may not be exercised in a manner intended to compel the Executive "to contradict an earlier recognition determination in an official document of the Executive Branch" that is addressed to foreign powers.57

While the *Zivotofsky* decision establishes that the recognition power belongs exclusively to the President, its relevance to other foreign affairs issues remains unclear. The opinion applied a functionalist approach in assessing the exclusivity of executive power on the issue of recognition, but did not opine on whether this approach was appropriate for resolving other inter-branch disputes concerning the allocation of constitutional authority in the field of foreign affairs. The *Zivotofsky* Court also declined to endorse the Executive's broader claim of exclusive or preeminent presidential authority over foreign relations, and it appeared to minimize the reach of some of the Court's earlier statements in *Curtiss-Wright*58 regarding the expansive scope of the President's foreign affairs power.59 The Court also repeatedly noted Congress's ample power to legislate on foreign affairs, including on matters that precede and follow from the President's act of foreign recognition and in ways that could render recognition a "hollow act."60 For example, Congress could institute a trade embargo, declare war upon a foreign

government that the President had recognized, or decline to appropriate funds for an embassy in that country. While all of these actions could potentially be employed by the legislative branch to express opposition to executive policy, they would not impermissibly interfere with the President's recognition power.61

The Practice in the Presidential Office.

However con- tested the theory of expansive presidential powers, the practice in fact has been one of expansion of those powers, an expansion that a number of "weak" Presidents and the temporary ascendancy of Congress in the wake of the Civil War has not stemmed. Perhaps the point of no return in this area was reached in 1801 when the Jefferson-Madison "strict constructionists" came to power and, instead of diminishing executive power and federal power in general, acted rather to enlarge both, notably by the latitudinarian construction of implied federal powers to justify the Louisiana Purchase.62 After a brief lapse into Cabinet government, the executive in the hands of Andrew Jackson stamped upon the presidency the outstanding features of its final character, thereby reviving, in the opinion of Henry Jones Ford, "the oldest political institution of the race, the elective Kingship."63 Although the modern theory of presidential power was conceived primarily by Alexander Hamilton, the modern conception of the presidential office was the contribution primarily of Andrew Jackson.64

Footnotes

14 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–635 (1952) (concurring opinion). ❐

15 A. UPSHUR, A BRIEF ENQUIRY INTO THE TRUE NATURE AND CHARACTER OF OUR FEDERAL GOVERNMENT 116 (1840). ❐

16 W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 202, 205 (1908). ❐

17 32 WRITINGS OF GEORGE WASHINGTON 430 (J. Fitzpatrick ed., 1939). *See* C. THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT (1931). ❐

18 7 WORKS OF ALEXANDER HAMILTON 76, 80–81 (J. C. Hamilton ed., 1851) (emphasis in original). ❐

19

1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 611–654 (1865). ❑

20

Id. at 621. In the congressional debates on the President's power to remove executive officeholders, *cf.* C. THACH, THE CREATION OF THE PRESIDENCY 1775–1789 ch. 6 (1923), Madison had urged contentions quite similar to Hamilton's, finding in the first section of Article II and in the obligation to execute the laws a vesting of executive powers sufficient to contain the power solely on his behalf to remove subordinates. 1 ANNALS OF CONGRESS 496–497. Madison's language here was to be heavily relied on by Chief Justice Taft on this point in Myers v. United States, 272 U.S. 52, 115–126 (1926), *but compare*, Corwin, *The President's Removal Power Under the Constitution*, in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1467, 1474–1483, 1485–1486 (1938). ❑

21

Compare Calabresi & Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992), *with* Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994), and responses by Calabresi, Rhodes and Froomkin, id. at 1377, 1406, 1420. ❑

22

272 U.S. 52 (1926). *See* Corwin, *The President's Removal Power Under the Constitution*, in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1467 (1938). ❑

23

C. THACH, THE CREATION OF THE PRESIDENCY, 1775–1789, ch. 6 (1923). ❑

24

Myers v. United States, 272 U.S. 52, 163–164 (1926). Professor Taft had held different views. "The true view of the executive functions is, as I conceive it, that the president can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary in its exercise. Such specific grant must be either in the federal constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest. . . ." W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139–140 (1916). ❑

25

295 U.S. 602 (1935). ❑

26

487 U.S. 654, 685–93 (1988). ❑

27

343 U.S. 579 (1952). ❑

28

299 U.S. 304 (1936). ❐

29

299 U.S. at 315–16, 318, 319. ❐

30

Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L. J. 467 (1946); Patterson, *In re United States v. Curtiss-Wright Corp.*, 22 TEXAS L. REV. 286, 445 (1944); Lofgren, *United States v. Curtiss-Wright Corporation: An Historical Reassessment*, 83 YALE L. J. 1 (1973), reprinted in C. LOFGREN, GOVERNMENT FROM REFLECTION AND CHOICE: CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM 167 (1986). ❐

31

E.g., *Ex parte* Quirin, 317 U.S. 1, 25 (1942) (Chief Justice Stone); Reid v. Covert, 354 U.S. 1, 5–6 (1957) (plurality opinion, per Justice Black). ❐

32

357 U.S. 116, 129 (1958). ❐

33

Haig v. Agee, 453 U.S. 280 (1981). For the reliance on *Curtiss-Wright*, *see* id. at 291, 293–94 & n.24, 307–08. *But see* Dames & Moore v. Regan, 453 U.S. 654, 659–62 (1981), qualified by id. at 678. *Compare* Webster v. Doe, 486 U.S. 592 (1988) (construing National Security Act as not precluding judicial review of constitutional challenges to CIA Director's dismissal of employee, over dissent relying in part on *Curtiss-Wright* as interpretive force counseling denial of judicial review), *with* Department of the Navy v. Egan, 484 U.S. 518 (1988) (denying Merit Systems Protection Board authority to review the substance of an underlying security-clearance determination in reviewing an adverse action and noticing favorably President's inherent power to protect information without any explicit legislative grant). In Loving v. United States, 517 U.S. 748 (1996), the Court recurred to the original setting of *Curtiss-Wright*, a delegation to the President without standards. Congress, the Court found, had delegated to the President authority to structure the death penalty provisions of military law so as to bring the procedures, relating to aggravating and mitigating factors, into line with constitutional requirements, but Congress had provided no standards to guide the presidential exercise of the authority. Standards were not required, held the Court, because his role as Commander-in-Chief gave him responsibility to superintend the military establishment and Congress and the President had interlinked authorities with respect to the military. Where the entity exercising the delegated authority itself possesses independent authority over the subject matter, the familiar limitations on delegation do not apply. Id. at 771–74. ❐

34

That the opinion "remains authoritative doctrine" is stated in L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 25–26 (1972). It is used as an interpretive precedent in AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD
) OF THE LAW, THE FOREIGN RELATIONS LAW OF THE UNITED STATES see, *e.g.*, §§ 1, 204, 339 (1987). The Restatement is circumspect, however, about the reach of the opinion in controversies between presidential and congressional powers. ❑

35

343 U.S. 579 (1952). ❑

36

343 U.S. 593, 597–602 (Justice Frankfurter concurring, though he also noted he expressly joined Justice Black's opinion as well), 634, 635–40 (Justice Jackson concurring), 655, 657 (Justice Burton concurring), 660 (Justice Clark concurring). ❑

37

343 U.S. at 582 (Justice Black delivering the opinion of the Court), 629 (Justice Douglas concurring, but note his use of the Fifth Amendment just compensation argument), 634 (Justice Jackson concurring), 655 (Justice Burton concurring). ❑

38

343 U.S. at 667 (Chief Justice Vinson and Justices Reed and Minton dissenting). ❑

39

Myers v. United States, 272 U.S. 52 (1926); United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936). In Dames & Moore v. Regan, 453 U.S. 654, 659–62, 668–69 (1981), the Court turned to *Youngstown* as embodying "much relevant analysis" on an issue of presidential power. And, in Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.23 (2006), the Court cited *Youngstown* with approval, as did Justice Kennedy, in a concurring opinion joined by three other Justices, id. at 638. ❑

40

Zivotofsky v. Kerry, 576 U.S. ___, No. 13–628, slip op. at 2 (2015). It appears that in every prior instance where the Supreme Court considered executive action in the field of foreign affairs that conflicted with the requirements of a federal statute, the Court had ruled the executive action invalid. *See id.* at 2 (Roberts, C.J., dissenting) ("For our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs."); Medellin v. Texas, 552 U.S. 491 (2008) (President could not direct state courts to reconsider cases barred from further review by state and federal procedural rules in order to implement requirements flowing from a ratified U.S. treaty that was not self-executing, as legislative authorization from Congress was required); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (military tribunals convened by presidential order did not comply with the Uniform Code of Military Justice); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Little v. Barreme, 6 U.S. (2 Cr.) 170 (1804) (upholding damage award to owners of U.S.

merchant ship seized during quasi-war with France, when Congress had not authorized such seizures). ❑

41

Foreign Relations Authorization Act, Fiscal Year 2003, P.L. 107–228, § 214(d), 116 Stat. 1350, 1366 (2002). ❑

42

Zivotofsky, slip op. at 4. The State Department's Foreign Affairs Manual generally provides that in issuing passports to U.S. citizens born abroad, the passport shall identify the country presently exercising sovereignty over the citizen's birth location. 7 Foreign Affairs Manual § 1330 Appendix D (2008). The Manual provides that employees should "write JERUSALEM as the place of birth in the passport. Do not write Israel, Jordan or West Bank for a person born within the current municipal borders of Jerusalem." Id. at § 1360 Appendix D. ❑

43

Zivotofsky, slip op. at 7 (quoting Brief from Respondent at 48). ❑

44

Id. (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637–38 (1952) (Jackson, J., concurring)). ❑

45

Id. at 8–11. ❑

46

U.S. CONST., art. II, § 3, cl. 4. *Zivotofsky*, slip op. at 9–10. ❑

47

Zivotofsky, slip op. at 9–10. The Court observed that records of the Constitutional Convention were largely silent on the recognition power, but that contemporary writings by prominent international legal scholars identified the act of receiving ambassadors as the virtual equivalent of recognizing the sovereignty of the sending state. *Id.* at 9. ❑

48

Justice Thomas, writing separately and concurring in part with the majority's judgment, would have located the primary source of the President's recognition power as the Vesting Clause. *Zivotofsky*, slip op. at 1 (Thomas, J., concurring and dissenting in part with the Court's judgment). The controlling five-Justice opinion declined to reach the issue of whether the Vesting Clause provided such support. *Zivotofsky*, slip op. at 10 (majority opinion). ❑

49

U.S. CONST., art. II, § 2, cl. 2. ❑

50

Id. ❑

51

Zivotofsky, slip op. at 11. ❑

52

Id. (quoting Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 424 (2003), and Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000)). ❐

53

Id. ❐

54

Id. at 20. ❐

55

Id. The Court observed that in no prior instance had Congress enacted a statute "contrary to the President's formal and considered statement concerning recognition." *Id.* at 21 (citing Zivotofsky v. Secretary of State, 725 F.3d 197, 203, 221 (D.C. Cir. 2013) (Tatel, J., concurring)). ❐

56

See id. at 14. The Court observed that earlier rulings touching on the recognition power had dealt with the division of power between the judicial and political branches of the federal government, or between the federal government and the states. *Id.* at 14–16 (citing Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398, 410 (1963) (involving the application of the act of state doctrine to the government of Cuba and stating that "[p]olitical recognition is exclusively a function of the Executive"); United States v. Pink, 315 U.S. 203 (1942) (concerning effect of executive agreement involving the recognition of the Soviet Union and settlement of claims disputes upon state law); United States v. Belmont, 301 U.S. 324 (1937) (similar to *Pink*); Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839) (ruling that an executive determination concerning foreign sovereign claims to the Falkland Islands was conclusive upon the judiciary)). ❐

57

See id. at 29. The Court approvingly cited its description in *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692 (1835), of a passport as being, "from its nature and object . . . addressed to foreign powers." See *Zivotofsky*, slip op. at 27. ❐

58

See United States v. Curtiss-Wright Export Co., 299 U.S. 304 (1936). For further discussion of this case, *see supra* Section 1. The President: Clause 1. Powers and Term of the President: Executive Power: Theory of the Presidential Office: The *Curtiss-Wright* Case. ❐

59

The majority opinion observed that *Curtiss-Wright* had considered the constitutionality of a congressional delegation of power to the President, and that its description of the Executive as the sole organ of foreign affairs was not essential to its holding in the case. *Zivotofsky*, slip op. at 18. ❐

60

Id. at 13. ❐

61

Id. at 13, 27. ❐

62

For the debates on the constitutionality of the Purchase, *see* E. BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, 1803–1812 (1920). The differences and similarities between the Jeffersonians and the Federalists can be seen by comparing L. WHITE, THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1801–1829 (1951), with L. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY (1948). That the responsibilities of office did not turn the Jeffersonians into Hamiltonians may be gleaned from Madison's veto of an internal improvements bill. 2 MESSAGES AND PAPERS OF THE PRESIDENTS 569 (J. Richardson comp., 1897). ❐

63

H. FORD, THE RISE AND GROWTH OF AMERICAN POLITICS 293 (1898). ❐

64

E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957, ch. 1 (4th ed. 1957). ❐