ESSAY

"NEUTRAL" GRAY BRIEFS

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The most significant foreign affairs cases that the Supreme Court has decided—including, among others, *Youngstown Sheet & Tube v. Sawyer*,[1] *United States v. Curtiss-Wright*,[2] and *Zivotofsky v. Kerry*[3]—have substantial effects at home. These canonical cases fix the boundaries of power between the coordinate branches of government. In this Essay, the Author wants to start a discussion that concerns one underexplored attribute of these cases: Although these cases adjudicate authority between the President and Congress, they are litigated between the Solicitor General and private parties.

The Supreme Court is limited by Article III of the Constitution to resolving "Cases" or "Controversies." [4] When the Court adjudicates foreign affairs issues, those issues are *litigated* as opposed to negotiated, administered, or legislated. There is a judicial record. There are briefs and arguments. And, critically, there are parties. Contrast the Judiciary's limited set of decision-making tools and processes with the other branches' much broader toolkits. The Executive Branch includes the State Department (and its ambassadors and foreign liaisons) and numerous sources of intelligence (including agencies housed within the Executive Branch). The Executive Branch can consult with foreign heads of state and multinational bodies. And it can include new intelligence

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1. 343 U.S. 579, 634-55 (1953) (Jackson, J., concurring) (setting the framework to adjudicate power disputes between President and Congress).
2. 299 U.S. 304, 319 (1936) (establishing the President is the "sole organ" in foreign affairs).
3. 576 U.S. 1059 (2015) (holding Congress may not qualify the President's exclusive recognition power).
4. U.S. CONST. art. III, § 2, cl. 1.

and information as it becomes available. Likewise, the Legislative Branch has access to intelligence and oversight and its decisionmakers can consult new evidence and keep up with foreign developments. By contrast, courts—including the Supreme Court—are constrained by the record and briefs that the parties put before them. Here, the Author would like to probe the role of one particular party, the Solicitor General: the officer charged with representing the "United States" in the Court.[5]

Often referred to as the "Tenth Justice,"[6] the Solicitor General is an integrated thread in the Supreme Court's fabric. The Solicitor General has a physical presence—her own office—located inside the Court.[7] The Court will often call for the Solicitor General's views at the certiorari stage and will permit the Solicitor General to participate at oral argument as the most frequent *amicus curiae*.[8] Scholars have written about the special status that the Solicitor General enjoys.[9] The Office's success at the Court is well-documented and unmatched at both the certiorari and merits stages.[10] Some attribute this high degree of success to the special care that the Solicitor General exercises in carrying out her role.[11] The Office employs a rigorous vetting process before choosing to petition for certiorari, and those who craft the briefs—the Solicitor

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5. *See* 28 U.S.C. § 518(a) (stating "except where the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . . in which the United States is interested."). The Attorney General, in turn, has delegated authority to the Solicitor General by regulation. *See* 28 C.F.R. § 0.20.

6. *See generally* LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987).

7. It is quite remarkable for one branch to have a physical space within another branch of government. Indeed, the only other is the Vice President's office in the Senate.

8. *See* Dr. Adam Feldman, *Amicus Oral Argument Participation Over Time*, EMPIRICAL SCOTUS (Jan. 4, 2017), https://empiricalscotus.com/2017/01/04/amicus-oral-argument/ [https://perma.cc/UAH8-2KTU].

9. *See generally* REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW (1992); Neal Devins, *Unitariness and Independence: Solicitor General Control Over Independent Agency Litigation*, 82 CAL. L. REV. 255, 260 (1994); Jeffrey A. Segal, Supreme Court Support for the Solicitor General: The Effect of Presidential Appointments, 43 W. POL. Q. 137, 147-50 (1990).

10. *See, e.g.*, SALOKAR, *supra* note 9, at 14-32 (collecting data at certiorari and merits stages).

11. Seth P. Waxman, *"Presenting the Case of the United States As It Should Be": The Solicitor General in Historical Context, Address to the Supreme Court Historical Society*, U.S. DEP'T OF JUST. (June 1, 1998), https://www.justice.gov/osg/about-office [https://perma.cc/5UVQ-4Z57].

General, the Principal Deputy Solicitor General, three career deputies, and sixteen assistants—are some of the most seasoned Supreme Court litigators in the country.[12] Even the bindings of the Solicitor General's arguments set it apart from the pack. When private parties file briefs they are either blue (petitioner), red (respondent), or green (*amicus*).[13] The Solicitor General's brief is always gray.[14] It appears to be literally neutral.

The Solicitor General is not neutral, however. It represents the interests of the "United States."[15] Who or what is the "United States"? In *United States v. Providence Journal* the Supreme Court answered precisely that question.[16] In a case with a complex procedural posture, a special prosecutor representing the Judicial Branch in a contempt proceeding sought permission from the Solicitor General to petition for certiorari, which the Solicitor General denied.[17] Nonetheless, the special prosecutor petitioned for certiorari and the Court decided the threshold question of whether the special prosecutor was permitted to bring this suit in light of the fact that the Solicitor General is the only officer who can litigate a case before the Court "in which the United States is interested."[18] Although both the special prosecutor and the Solicitor General argued that this was not a case "in which the United States is interested," the Court found that the Article III judicial power at stake was very much part of the sovereign United States.[19] "It seems to be elementary that even when exercising distinct and jealously separated powers, the three branches are but 'co-ordinate parts of one government[,]'" and so, the Solicitor

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12. *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (theorizing the advantages that repeat players enjoy in litigation). Indeed, some in the Office have argued over a hundred cases before the Supreme Court.

13. *U.S. Supreme Court – Booklet Format Specification Chart*, SUPREME COURT, https://www.supremecourt.gov/casehand/USSC%20-%20Booklet-Format%20Specification%20Chart%202019.pdf [https://perma.cc/56AB-SH9U] (last visited May 1, 2020).

14. So close is the working relationship between the Solicitor General's Office and the Supreme Court that the Supreme Court's chart describing to parties how briefs should be filed does not even include directions for the Solicitor General's briefs. *See id.*

15. *See* 28 U.S.C. § 518(a) (providing statutory text and regulatory provisions).

16. United States v. Providence Journal Co., 485 U.S. 693, 701 (1988).

17. *Id.* at 698-99.

18. 28 U.S.C. § 518(a).

19. *Providence Journal*, 485 U.S. at 700-03.

General represents all of those interests, not just the Executive Branch's interests.[20]

The ubiquity of the Solicitor General's participation in public law cases carries the specter of a distorting effect in the development of public law: the Solicitor General can coordinate its positions over a long period of time, it can settle hard cases or confess error in cases with bad facts, and it can help craft the record that ultimately comes before the Court.[21] But the potential distorting effect of its participation is even more concerning in the foreign affairs arena, particularly when considered together with doctrines of deference to executive branch expertise.[22] Although the Solicitor General aspires "to ensure that the United States speaks in court with a single voice – a voice that speaks on behalf of the rule of law[,]"[23] when there is an inter-branch conflict—often taking the form of the President versus Congress—the Solicitor General almost always represents the President. For example, in *Youngstown Sheet and Tube v. Sawyer*—the canonical decision setting out an adjudicative framework for executive power in foreign affairs—Secretary of Commerce Sawyer (*i.e.*, the Executive Branch) was represented by the Solicitor General.[24] Congress' interest in its statute, by contrast, was represented by the private petitioners, Youngstown Sheet and Tube, and others.[25]

One of the modern cases concerning the relationship between Congress and the President in foreign affairs matters was commenced by a private citizen. Menachim Zivotofsky is a US citizen born in Jerusalem.[26] In December 2002, Zivotofsky's

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20. *Id.* at 701 (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928)).

21. David M. Rosenzweig, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079 (1993); Neal K. Katyal, *The Solicitor General and Confession of Error*, 81 FORDHAM L. REV. 3027 (2013); Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. (forthcoming) (chronicling specific examples where the Solicitor General coordinates a position over time with an apparent strategic aim). At times, it is not the Solicitor General that directly controls these decisions, but other actors within the Department of Justice or Executive Branch.

22. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (deferring to Executive's national security expertise).

23. *See* Waxman, *supra* note 11.

24. *Youngstown*, 343 U.S. at 581.

25. *See* Brief for Plaintiff Companies at 18-26, Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1953) (Nos. 744, 745), 1952 WL 82173 (arguing that *Congress* provided a remedy in the Labor Management Relations Act of 1947).

26. Zivotofsky v. Clinton, 566 U.S. 189, 192 (2012).

mother filed an application for a Consular Report of Birth Abroad and sought to obtain a US Passport for Zivotofsky, listing his birthplace as "Jerusalem, Israel."[27] Diplomatic officials informed Zivotofsky's mother that State Department policy required them to record "Jerusalem" as the place of birth (without reference to Israel).[28] This State Department policy, ostensibly crafted to navigate Middle East tensions, violated Congress' word in the Foreign Relations Authorization Act, which required the Secretary of State to list the birthplace as "Israel" if so requested.[29] Zivotofsky's parents thus initiated suit seeking an order compelling the State Department to identify Zivotofsky's birthplace as "Jerusalem, Israel" pursuant to the Act.[30] The fundamental question presented by this dispute was whether the Foreign Relations Authorization Act impermissibly infringes upon the President's power to recognize foreign states. Congress' passport power—not enumerated, but historically exercised—and the President's recognition power—not enumerated, but derived from the authority to receive foreign officers—clashed.

The first time the suit came to the Court, styled *Zivotofsky v. Clinton*, the primary question presented was whether the case presented a non-justiciable political question.[31] The D.C. Circuit below relied on the theory that because the Constitution grants the President the exclusive authority to recognize foreign states, the Judiciary cannot review those decisions.[32] In an 8-1 decision, the Supreme Court reversed, concluding that the dispute was indeed justiciable. The Court reasoned, in part, that although the recognition power belongs to the President alone, interpreting the scope of the recognition power—an exercise in constitutional interpretation—does *not* belong to the President alone.[33]

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27. *Id.* at 192-93.
28. *Id.* at 193.
29. *See* Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002) (mandating "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record he birth place as Israel").
30. *Zivotofsky*, 566 U.S. at 193.
31. *Id.*
32. *Id.* at 193-94.
33. *Id.* at 201.

In 2014, the case returned to the Court, this time styled *Zivotofsky v. Kerry.*[34] Briefing and argument centered on the clash between Congress and the President, not on Zivotofsky's injury.[35] The opinion hardly mentions Zivotofsky other than to evaluate the arguments presented in his brief. Curiously, however, in spite of the fact that the House of Representatives and the Senate each filed *amici curiae* briefs, the Court assessed the arguments put forth in *Zivotofsky*'s brief, not those advanced by Congress.[36] Ultimately, the Court conceded that legal precedents did not resolve the scope of the President's Recognition Power. But the confluence of precedent and historical practice—including historical Congressional acquiesce—dictated the result. "[T]he exclusive recognition power is essential to the conduct of Presidential duties. The formal act of recognition is an executive power that Congress may not qualify."[37]

Zivotofsky highlights the asymmetry between the Executive and Legislative Branches in foreign affairs cases before the Court. Although the suit was initiated by a private individual, by the time the Court decided the merits of the dispute, the only question was the appropriate division of authority between Congress and the President.[38] Yet Congress has no formal representative before the Court. Each house of Congress filed an *amicus* brief, but neither house of Congress participated at oral argument.[39] By contrast, the Solicitor General filed a merits brief and argued before the Court.[40]

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34. Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015).

35. *See generally* Transcript of Oral Argument, Zivotofsky v. Clinton, 576 U.S. 1059 (2015) (No. 10-699).

36. 135 S. Ct. at 2103-04 (stating that the sole exception is a single citation to the Congressional briefs in the section where the Court evaluates the Passport Power arguments in Zivotofsky's brief).

37. *Id.* at 2081-82.

38. Petition for Writ of Certiorari, Zivotofsky v. Clinton, 576 U.S. 1059 (2015) (No. 10-699) (presenting the question "Whether a federal statute that directs the Secretary of State, on request, to record the birthplace of an American citizen born in Jerusalem as born in 'Israel' on a Consular Report of Birth Abroad and on a United States passport is unconstitutional on the ground that the statute 'impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him'").

39. *See* Brief for Members of the US House of Representatives as *Amici Curiae* in Support of Petitioner, Zivotofsky v. Kerry, 576 U.S. 1059 (2015) (No. 13-628); Brief for the US Senate as *Amicus Curiae* Supporting Petitoner, Zivotofsky v. Kerry, 576 U.S. 1059 (2015) (No. 13-628).

40. *See* Brief for the Respondent, Zivotofsky v. Kerry, 576 U.S. 1059 (2015) (No. 13-628).

The opinion for the Court, moreover, chronicles the delicate story of Jerusalem's status, relying principally on presidential actions and statements, not on Congressional action.[41]

In a case-or-controversy system where the adjudication of separation-of-powers disputes are litigated between private parties and the Solicitor General, the specter of distortion is real. There is a difference between participating as a formal party and availing oneself of other modes of participation. Of course, Congress and its members have the opportunity to file *amici curiae* briefs with the Supreme Court to advocate their views. Without unanimity among its members, however, Congressional *amici* briefs may appear partisan and therefore be less effective. Even where Congress is unanimous—as in *Zivotofksy*—the fact that the Executive is a formal party allows it to enjoy a spectrum of authority and autonomy that Congress does not. The Executive can settle cases, moot issues, and thus can effectively prevent the Court from ruling in a particular case. It can also be strategic at the certiorari stage, urging the Court to take the case with the best facts or the best law for the Executive. Most fundamentally, although a private party may be aligned with Congress in some broad sense, that does not mean that a private party will advocate for Congressional authority with the same zeal that the Solicitor General does for Executive authority. The fact that the private party's interest is aligned with Congress' is merely incidental to winning. Still further, the parties themselves are responsible for creating the factual and legal record on which the Supreme Court ultimately rules. Even before the case is formally in the Solicitor General's hands, the Department of Justice participates and can coordinate with other parts of the Executive Branch to make strategic litigation decisions. Deciding whether authority formally belongs to the President or Congress may come down to whether a case was well litigated by a private party. For instance, a private party may formally waive, or more likely, unintentionally forfeit winning legal arguments by failing to make them below.[42]

When viewed through this lens, the decisions that set the foundation for the separation of powers and balance of powers among our coordinate branches of government—including

41. *See* 135 S. Ct. at 2081-83 (Part I).

42. *See, e.g.*, Am. Nat. Bank & Trust Co. of Chi. v. Haroco, Inc., 473 U.S. 606, 608 (1985) (declining to resolve argument that petitioners failed to make in court below).

Youngstown, *Curtiss-Wright*, and *Zivotofsky*—are litigated from a place of asymmetry. The Court is sensitive to this asymmetry, but it is sensitive in *ad hoc* ways.[43] Where Congress has filed its own brief, the Court sometimes allows Congress to participate at argument.[44] At other times, Congressional *amici* do not participate.[45]

There is further reason to be sensitive to this asymmetry at the present moment. In the domestic sphere, there has been cause to question the Solicitor General's neutrality. Some have been particularly skeptical of arguments made by the Solicitor General before the Court and have questioned the Solicitor General's use of procedural mechanisms to circumvent ordinary review.[46] The Solicitor General has filed an unprecedented number of motions seeking Supreme Court review without traditional appellate review.[47] "Claiming one emergency after another, the [Solicitor General] has recently sought stays in an unprecedented number of cases . . . ."[48] At least one justice has seen reason to be more skeptical of the Solicitor General's claims of urgency.[49]

It is therefore an apt moment to question the role of litigants before the Court. The Author would like to close by laying out an analytical research agenda to probe the role of the Solicitor General in foreign affairs disputes that go to the fundamental division of

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43. In the context of the Alien Tort Statute, the Court was particularly skeptical of the Solicitor General when its positions *changed* between administrations. *See, e.g.*, Transcript of Oral Reargument at 34, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2012) (No. 10-1491).

44. For example, when the Solicitor General declined to defend the Defense Against Marriage Act, the Bipartisan Legal Advisory Group ("BLAG") of the United States House of Representatives voted to intervene in the suit and litigated the case at the Supreme Court on Congress' behalf. BLAG participated at oral argument, yet there was a substantial question whether the Solicitor General's decision not to defend the statute deprived the Court of jurisdiction. *See generally* United States v. Windsor, 570 U.S. 744 (2013). Indeed, in assessing the prudential considerations that went to Congress' standing in the case, the Court considered "the extent to which adversarial presentation of the issues is assured by the participation of *amici curiae* prepared to defend with vigor the constitutionality of the legislative act." 570 U.S. at 760.

45. In *Zivotofsky v. Kerry*, 576 U.S. at 1059, each House of Congress filed an *amicus* brief, yet neither House of Congress participated at argument.

46. Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 159 (2019).

47. *Id.* at 132-52.

48. Wolf v. Cook Cnty., 140 S. Ct. 681, 683 (2020) (Sotomayor, J., dissenting).

49. *Id.* ("And with each successive application, of course, its cries of urgency ring increasingly hollow").

authority between Congress and the President. Should the Solicitor General be accorded inchoate deference and respect as a repeat player in these disputes? How can the Court assess when the Solicitor General represents the views of the *United States* without first deciding to whom the authority at issue belongs? Should the Court formally welcome an advocate to represent the Congressional interest in these disputes? Should Congress statutorily create a "Congressional Solicitor General" to represent its interests before the Supreme Court? Would such an office further entrench the Solicitor General's representation of the President in these disputes? Of course, these will raise threshold jurisdictional questions about Congressional standing and political question doctrine, which the Court has yet to resolve.[50] But the resolution of these questions may affect the balance of authority between the three branches.

50. For interesting assessments of these issues, see, e.g., Vicki C. Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy*, 93 IND. L.J. 845 (2018); Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571 (2014); Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 144 MICH. L. REV. 339 (2015).