

# ZIVOTOFSKY V. KERRY: OF PASSPORTS, POLITICS, AND FOREIGN POLICY POWERS

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## INTRODUCTION

Curiously, throughout the entire history of the United States, our government has managed to skirt the necessity to delineate the boundaries between Presidential and Congressional powers in regard to foreign affairs.<sup>1</sup> An absence of explicit constitutional guidelines has led to confused reliance upon conflicting extratextual sources, ambiguous historical actions, and vague Supreme Court dicta.<sup>2</sup> While modern scholars seem to have a broad conception of the respective foreign affairs powers that the President and Congress should enjoy, the failure of the Constitution and the historical record to delineate these powers expressly has created complex tensions between these two branches.<sup>3</sup> Interestingly, *Zivotofsky v. Kerry*,<sup>4</sup> in seeking guidance as to the treatment of a city on the other side of the world, brings to light this very deficiency in our own constitutional law, and compels an imminent determination regarding the division of our nation's foreign affairs powers.

## I. FACTUAL AND PROCEDURAL BACKGROUND

United States citizen Menachem Binyamin Zivotofsky (Zivotofsky) was born in Jerusalem in 2002 to Ari Z. and Naomi Siegman Zivotofsky, who are also United States citizens.<sup>5</sup> The same year, Zivotofsky's mother applied for a United States passport for

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1. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 233 (2001).

2. *Id.*

3. *Id.*

4. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State (Zivotofsky VI)*, 725 F.3d 197 (D.C. Cir. 2013), *cert. granted* 134 S. Ct. 1873 (Apr. 21, 2014) (No. 13-628).

5. *Id.* at 203.

him, listing his birthplace as “Jerusalem, Israel.”<sup>6</sup> The State Department, in compliance with its policy set forth in 7 FAM 1383.5–6, issued a passport in Zivotofsky’s name listing his birthplace as merely “Jerusalem” and omitting any country designation.<sup>7</sup>

On September 16, 2003, Zivotofsky’s parents brought suit on his behalf against the Secretary of State, seeking, inter alia, declaratory relief and a permanent injunction ordering the Secretary to issue Zivotofsky a passport listing “Jerusalem, Israel” as his birthplace.<sup>8</sup> They cited section 214(d) of the Foreign Relations Authorization Act,<sup>9</sup> which requires the Department of State to list the birthplace of a person born in Jerusalem as “Jerusalem, Israel” upon request.<sup>10</sup>

Since then, the litigation has been volleyed back and forth within the federal court system.<sup>11</sup> In 2004, the district court dismissed the case on the grounds that Zivotofsky lacked Article III standing and that the case concerned a nonjusticiable political question.<sup>12</sup> In 2006, the D.C. Circuit Court of Appeals reversed this decision, holding that Zivotofsky did have standing to bring suit.<sup>13</sup> The D.C. Circuit noted that Zivotofsky had amended the injunctive relief he sought, requesting that the Secretary record “Israel” rather than “Jerusalem, Israel” as his birthplace on his passport.<sup>14</sup> It remanded the case to the district court so that a more complete record relating to the subjects of dispute could be developed.<sup>15</sup>

On September 19, 2007, the district court dismissed the suit again, determining for the second time that it presented a nonjusticiable political question.<sup>16</sup> The D.C. Circuit affirmed, finding that “[b]ecause the judiciary has no authority to order the executive branch to change the nation’s foreign policy in this matter, this case is nonjusticiable

6. *Id.*

7. *Id.*

8. *Id.*

9. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2003) (codified in scattered sections of 8, 22, and 50 U.S.C.A.).

10. Zivotofsky ex rel. Zivotofsky v. Sec’y of State (*Zivotofsky I*), No. 03-cv-1921, 2004 WL 5835212, at \*1 (D.D.C. Sept. 7, 2004).

11. *Zivotofsky VI*, 725 F.3d at 203.

12. *Id.* (citing *Zivotofsky I*, No. 03-cv-1921, 2004 WL 5835212, at \*4).

13. *Id.* (citing Zivotofsky ex rel. Zivotofsky v. Sec’y of State (*Zivotofsky II*), 444 F.3d 614 (D.C. Cir. 2006)).

14. *Id.* (citing *Zivotofsky II*, 444 F.3d at 616).

15. *Id.* (citing *Zivotofsky II*, 444 F.3d at 619–20).

16. *Id.* (citing Zivotofsky ex rel. Zivotofsky v. Sec’y of State (*Zivotofsky III*), 511 F. Supp. 2d 97 (D.D.C. 2007)).

under the political question doctrine.”<sup>17</sup>

The Supreme Court of the United States vacated and remanded this decision, holding that the case does not present a political question.<sup>18</sup> The Supreme Court explained that the case did not ask the federal courts “to supplant a foreign policy decision of the political branches,” but rather, to enforce a specific statutory right.<sup>19</sup> Because the parties did not dispute the substance of section 214(d), the Supreme Court stated that “the only real question for the courts is whether the statute is constitutional,” which warrants a determination of whether it impermissibly intrudes upon Presidential powers under the Constitution.<sup>20</sup> The Supreme Court instructed that “[r]esolution of Zivotofsky’s claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers.”<sup>21</sup>

## II. LEGAL BACKGROUND

Jerusalem’s history has been a contentious saga of settlers, colonists, and pilgrims of diverse origins.<sup>22</sup> It has been home to Jews, Arabs, and many others with passionate and ancient historical claims.<sup>23</sup> Fierce political controversy surrounding the city remains alive in modern times, as both the state of Israel and the Palestinian people claim sovereignty over Jerusalem.<sup>24</sup> This political unrest gives rise to the legal uncertainty at issue in this case.<sup>25</sup>

Eleven minutes after Israel declared independence in 1948, President Harry S. Truman recognized it as a foreign sovereign.<sup>26</sup> However, despite the United States’s eagerness to recognize the country, Presidents from Truman forward have adopted a policy of

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17. *Id.* at 203–04 (quoting *Zivotofsky ex rel. Zivotofsky v. Sec’y of State (Zivotofsky IV)*, 571 F.3d 1227, 1228 (D.C. Cir. 2009)).

18. *Id.* (citing *Zivotofsky ex rel. Zivotofsky v. Clinton (Zivotofsky V)*, 132 S. Ct. 1421 (2012)).

19. *Id.* (quoting *Zivotofsky V*, 132 S. Ct. at 1427).

20. *Id.* (quoting *Zivotofsky V*, 132 S. Ct. at 1427–28).

21. *Id.* (quoting *Zivotofsky V*, 132 S. Ct. at 1430).

22. SIMON SEBAG MONTEFIORE, *JERUSALEM* 532 (1st ed. 2012).

23. *See id.*

24. *Zivotofsky VI*, 725 F.3d at 200.

25. *Id.*

26. Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. RICH. L. REV. 801, 804 (2011).

strict neutrality regarding sovereignty over Jerusalem.<sup>27</sup> The State Department’s Foreign Affairs Manual (FAM) reflects this position of neutrality,<sup>28</sup> containing a detailed policy regarding the treatment of Jerusalem.<sup>29</sup> Among its many components, this FAM policy provides that for an applicant born in Jerusalem, “[d]o not write Israel or Jordan” on his passport, as Israel “[d]oes not include Jerusalem . . . .”<sup>30</sup> As such, the State Department is obligated to record “Jerusalem” rather than “Jerusalem, Israel” or “Israel” as the place of birth on the passports of applicants born in Jerusalem after 1948.<sup>31</sup>

Over the last two decades, Congress has pushed back against the executive policy of neutrality, endeavoring to recognize Jerusalem as falling within the sovereignty of Israel.<sup>32</sup> In 1995, it enacted the Jerusalem Embassy Act, which states that “Jerusalem should be recognized as the capital of the State of Israel” and that “the United States Embassy in Israel should be established in Jerusalem.”<sup>33</sup> The Department of Justice and the Secretary of State at the time vehemently opposed this act, claiming the Act would impermissibly intrude upon the President’s exclusive power to recognize foreign nations and would severely impair the success of Arab-Israeli peace negotiations.<sup>34</sup> Congress ultimately enacted the legislation with a waiver provision authorizing the President to suspend the funding restriction for six-month periods in the interest of national security.<sup>35</sup>

On September 30, 2002, President George W. Bush signed the Foreign Relations Authorization Act.<sup>36</sup> Section 214(d), the provision at issue, provides:

(d) RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES. —For 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

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27. *Zivotofsky VI*, 725 F.3d at 200.

28. *Id.* at 201.

29. *Id.* (citing U.S. DEPT. OF STATE, 7 FOREIGN AFFAIRS MANUAL § 1383.6(a)) [hereinafter FAM].

30. *Id.* (citing 7 FAM 1383 Ex. 1383.1 pt. II).

31. *Id.*

32. *Id.*

33. *Id.* (quoting Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, § 3(a)–(b), 109 Stat. 398, 399 (1995)).

34. *Id.* at 201–02 (citing 164 CONG. REC. S15, 463, 468 (daily ed. Oct. 23, 1995)).

35. *Id.* at 202 (citing Pub. L. No. 104-45, 109 Stat. at 400).

36. *Id.* (citing Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2003) (codified in scattered sections of 8, 22, and 50 U.S.C.A)).

shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.<sup>37</sup>

The President issued a signing statement with the Act, warning that it contained provisions which impermissibly interfere with the President's constitutional powers regarding foreign affairs.<sup>38</sup> It stated that section 214(d) specifically, if construed as mandatory rather than advisory, would interfere with the President's constitutional authority to decide the terms upon which to recognize foreign nations.<sup>39</sup>

### III. HOLDING

The D.C. Circuit first framed the case with Justice Jackson's well-adopted tripartite framework in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>40</sup> under which the court evaluates the President's powers to act based upon the level of congressional acquiescence.<sup>41</sup> The court restated:

First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . . ." Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers. . . ." Third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his 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."<sup>42</sup>

The court noted that both parties agree that the present case falls into the *Youngstown* framework's third category, requiring a determination of whether the recognition power, when at its "lowest ebb," authorizes the Secretary to decline to enforce section 214(d).<sup>43</sup>

Following the Supreme Court's instruction, the D.C. Circuit then began the analysis of the separation of powers question with a careful examination of the "textual, structural, and historical" evidence.<sup>44</sup> It acknowledged that "[n]either the text of the Constitution nor

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37. *Id.* (quoting Foreign Relations Authorization Act, 116 Stat. at 1366).

38. *Id.* (quoting Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1698, 2002 WL 31161653, at \*1-2 (Sept. 30, 2002)).

39. *Id.* (citing Statement on Signing the Foreign Relations Authorization Act, 2002 WL 31161653, at \*1-2).

40. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

41. *Zivotofsky VI*, 725 F.3d 197, 204 (D.C. Cir. 2013).

42. *Id.* at 204-05 (quoting *Youngstown*, 343 U.S. at 635-37).

43. *Id.* at 205.

44. *Id.* at 205-06 (quoting *Zivotofsky V*, 132 S. Ct. 1421, 1430 (2012))

originalist evidence provides much help in answering the question of the scope of the President's recognition power."<sup>45</sup> The court discussed the ambiguities within the "receive ambassadors" clause of the Constitution and *Federalist No. 69*, and suggested that the omission of references to an exclusive presidential recognition power was likely due to the founders' greater concern with whether foreign nations would recognize the United States than with how the United States would recognize foreign nations.<sup>46</sup>

The court then considered post-ratification history, which, the court explained, supports the Secretary's position that the President holds the recognition power exclusively.<sup>47</sup> It cited a number of historical examples in which the President acted unilaterally or in which the legislative branch deferred to the President on matters of foreign recognition.<sup>48</sup> In addition, the court considered Supreme Court dicta in some cases in which the President's stance on foreign recognition was declared binding upon the judiciary, and other cases indicating that the President could exercise the recognition power without the consent of the Senate.<sup>49</sup>

After concluding that the President holds the recognition power exclusively, the court then considered whether section 214(d) impermissibly intrudes upon that exclusive recognition power.<sup>50</sup> It stated that Congress does not have exclusive control over passport matters, because the executive branch has retained the power to intervene when issues of national security and foreign policy are implicated.<sup>51</sup> The President's recognition power, it explained, "includes the power to determine the policy which is to govern the question of recognition,"<sup>52</sup> and reiterated the Secretary's arguments that section 214(d) "runs headlong into a carefully calibrated and longstanding executive branch policy of neutrality toward Jerusalem."<sup>53</sup> The court concluded by affirming the district court's judgment dismissing the complaint on the alternative ground that section 214(d) infringes upon the President's exclusive recognition power and is thus

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45. *Id.* at 206.

46. *Id.* at 206–07 (citations omitted).

47. *Id.* at 207.

48. *Id.* at 207–10 (citations omitted).

49. *Id.* at 211–13 (citations omitted).

50. *Id.* at 214.

51. *Id.* at 215 (citing *Haig v. Agee*, 453 U.S. 280, 295 (1981)).

52. *Id.* at 216 (quoting *United States v. Pink*, 315 U.S. 203, 229 (1942)).

53. *Id.*

unconstitutional.<sup>54</sup>

#### IV. ARGUMENTS

##### A. *Zivotofsky's Arguments*

Zivotofsky argues that section 214(d) is well within Congress's passport powers, and even if it were not, it does not intrude upon any exclusive presidential powers.<sup>55</sup>

##### 1. Section 214(d) is Appropriate Passport Legislation

Zivotofsky argues that 214(d) is permissible passport legislation falling well-within the confines of Congress's passport powers.<sup>56</sup> Congress has dealt frequently with the subject of passports, and the Supreme Court has looked to Congress's legislation in resolving passport issues even when they affect significant foreign policy concerns.<sup>57</sup>

Zivotofsky cites the fact that, in 1994, Congress directed the Secretary of State to permit United States citizens born in Taiwan to list "Taiwan" as their place of birth on their passports, despite the fact that the United States did not recognize Taiwan as a foreign state.<sup>58</sup> The State Department responded by issuing a formal policy declaration stating that its "one-China" policy had not changed despite the new passport legislation.<sup>59</sup> This, Zivotofsky asserts, demonstrates that 214(d) may be implemented while maintaining the executive branch's recognition policy on Jerusalem.<sup>60</sup>

Zivotofsky also notes that the Supreme Court has consistently limited the President's power over passport matters to the authority conferred to him by statute.<sup>61</sup> He cites *Zemel v. Rusk*,<sup>62</sup> in which the President was "statutorily authorized to refuse to validate passports of United States citizens for travel to Cuba[.]" and *Haig v. Agee*,<sup>63</sup> in

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54. *Id.*

55. Brief for the Petitioner at 16–17, *Zivotofsky v. Kerry*, No. 13-628 (U.S. Jul. 15, 2014) [hereinafter Brief for the Petitioner].

56. *Id.* at 19.

57. *Id.* at 20–21 (citations omitted).

58. *Id.* at 12, 21–22 (citing State Department Authorization Technical Corrections Act, Pub. L. No. 103-415, 108 Stat. 4299 (1994)).

59. *Id.* at 13, 22 (citation omitted).

60. *Id.* at 22.

61. *Id.*

62. *Zemel v. Rusk*, 381 U.S. 1 (1965).

63. *Haig v. Agee*, 453 U.S. 280 (1981).

which the Secretary of State could revoke the passport of a citizen causing serious damage to United States foreign policy because “the statute authorize[d] the action[.]”<sup>64</sup> Zivotofsky emphasizes that such precedents demonstrate that the President may not nullify Congress’s directive in passport legislation merely by asserting a foreign policy concern.<sup>65</sup>

Furthermore, Zivotofsky asserts that even if foreign policy concerns were sufficient to provide the executive with the authority to interfere with Congress’s passport powers, the State Department’s place-of-birth rules do not constitute a rational recognition policy.<sup>66</sup> The Foreign Affairs Manual permits “Taiwan,” “Gaza Strip,” “West Bank,” and “Palestine” to be recorded as places of birth, despite the fact that the United States has never recognized any of these regions as foreign sovereigns.<sup>67</sup> Therefore, the simple recording of a region as a place of birth cannot be tantamount to a formal recognition of sovereignty.<sup>68</sup>

In addition, Zivotofsky highlights that Congress frequently legislates in areas affecting foreign policy.<sup>69</sup> For example, Congress creates immigration legislation, which the Supreme Court has recognized “can affect trade, investment, tourism, *and diplomatic relations for the entire Nation . . .*”<sup>70</sup> In addition, Congress exercises its constitutional powers to regulate foreign commerce and appropriations.<sup>71</sup> The executive has never disregarded or refused to enforce any such legislation on the grounds that it interferes with the conduct of the nation’s foreign policy.<sup>72</sup>

## 2. Section 214(d) does not Infringe an Exclusive Presidential Power

Zivotofsky argues that neither the Constitution nor post-ratification history support the existence of any exclusive presidential recognition power.<sup>73</sup> He explains that the original understanding of

64. Brief for the Petitioner, *supra* note 55, at 22–24 (quoting *Zemel*, 381 U.S. at 3; *Haig*, 453 U.S. at 289).

65. *Id.* at 24.

66. *Id.* at 25.

67. *Id.* (citations omitted).

68. *Id.*

69. *Id.* at 26.

70. *Id.* (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (emphasis added)).

71. *Id.* at 27.

72. *Id.* at 26–27.

73. *Id.* at 27–28.



the “receive ambassadors clause” in Article II, Section 3 of the Constitution did not give the president exclusive authority to recognize foreign sovereigns.<sup>74</sup> Instead, Alexander Hamilton referred to it in *The Federalist No. 69* as “more of a matter of dignity than authority[.]”<sup>75</sup> Even if the “receive ambassadors clause” did vest an implied recognition power in the President, it was certainly not exclusive, because other means of recognizing foreign governments, such as creating treaties or appointing ambassadors, require Senate approval.<sup>76</sup> In addition, Congress has exercised recognition power under its war and foreign affairs authority.<sup>77</sup>

Zivotofsky further claims that Chief Justice John Marshall’s opinion for the Court in 1818’s *United States v. Palmer*,<sup>78</sup> as well as other Supreme Court decisions, have described a shared recognition authority.<sup>79</sup> In *Palmer*, a piracy prosecution, the Court held:

[W]hen civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the union must view such newly constituted government *as it is viewed by the legislative and executive departments of the government of the United States*.<sup>80</sup>

Additionally, the constitutional law treatises of William Rawle and Joseph Story state that the legislature has superior recognition power, and may declare its dissent from executive recognition or acknowledge the sovereignty of another nation that the executive has refused to acknowledge.<sup>81</sup> Further yet, Zivotofsky asserts that post-ratification history does not support the existence of an exclusive executive recognition power, and cites to a number of examples in which recognition decisions were apparently made by Congress, or in which the President implemented a recognition decision in conjunction with Congress.<sup>82</sup>

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74. *Id.* at 28.

75. *Id.* (quoting THE FEDERALIST NO. 69 (Alexander Hamilton)).

76. *Id.* at 29.

77. *Id.* at 30.

78. *United States v. Palmer*, 16 U.S. 610 (1818).

79. *Id.* at 30.

80. Brief for the Petitioner, *supra* note 55, at 30–31 (quoting *Palmer*, 16 U.S. at 643 (emphasis added)).

81. *Id.* at 32–33 (citing WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 96 (Philip H. Nicklin, 2d ed. 1829) and 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1560 (1833)).

82. *Id.* at 34, 57.

### 3. Dicta in the Supreme Court's Opinions does not Concern Disagreement between Congress and the President

Zivotofsky also points out that, despite the D.C. Circuit's emphasis upon Supreme Court dicta in rendering its decision, no Supreme Court case, in dicta or otherwise, has ever addressed whether recognition power is exclusive to the President or shared with Congress.<sup>83</sup> In fact, the Supreme Court has never addressed the issue presented by Zivotofsky's case, in which the executive acts contrarily to a Congressional enactment.<sup>84</sup>

### 4. Enforcement of 214(d) Will Have Negligible Impact on American Foreign Policy

Lastly, Zivotofsky asserts that because the enforcement of section 214(d) would have only a negligible impact upon foreign policy, there are not strong enough grounds for the executive to override Congress when the executive's power is at its lowest ebb.<sup>85</sup> He explains that, with the exception of persons born in Jerusalem, the State Department has applied the place-of-birth requirement flexibly to accommodate the personal ideologies of passport holders in virtually all instances, including in regard to Palestinian-American passport holders.<sup>86</sup> Section 214(d) would affect only a potential 50,000 Jerusalem-born Americans, and despite Palestinian perception, would not actually have the effect of changing United States policy regarding Jerusalem.<sup>87</sup>

## B. Secretary Kerry Arguments

Secretary of State John Kerry argues that the nation should speak with one voice in deciding whether to recognize foreign nations, and that this one voice belongs to the executive branch.<sup>88</sup> He asserts that this exclusive presidential recognition power is derived from the Constitution.<sup>89</sup> Furthermore, he contends that section 214(d) constitutes an unconstitutional encroachment upon this exclusive

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83. *Id.* at 58.

84. *Id.* at 59.

85. *Id.* at 63–64.

86. *Id.* at 63.

87. *Id.* at 63–64.

88. Brief for the Respondent at 9, *Zivotofsky v. Kerry*, No. 13-628 (U.S. Sep. 22, 2014) [hereinafter Brief for the Respondent].

89. *Id.*

presidential recognition power.<sup>90</sup>

### 1. The Constitution Grants the President Exclusive Power to Recognize Foreign States

The Secretary asserts that the primary source of the President's recognition power comes from Article II's grant of authority to the President alone to "receive Ambassadors and other public Ministers."<sup>91</sup> He explains that this authority must include the power to decide whether to establish diplomatic relations with a foreign entity.<sup>92</sup> Because establishing diplomatic relations with a foreign entity entails treating the entity as a state, the recognition power is vested solely in the President.<sup>93</sup> He cites George Washington's decision to receive Edmond Genet, minister of the new government of France, which Alexander Hamilton and Thomas Jefferson warned would constitute an acknowledgement of the legitimacy of this government.<sup>94</sup>

Kerry explains that the President's recognition power is further grounded in the Constitution's assignment of the bulk of foreign affairs powers to the President.<sup>95</sup> He points out that, in a move away from the Articles of Confederation's assignment of foreign relations solely to Congress, the Constitution designates the executive as "the sole organ of the federal government in the field of international relations."<sup>96</sup> It provides the President with the power to nominate ambassadors and to make treaties, which constitute recognition decisions.<sup>97</sup>

Moreover, Kerry asserts that structural and functional considerations confirm that the President's recognition power is exclusive.<sup>98</sup> The Constitution, he claims, contains no provision for Congress to make, or even participate in, recognition decisions.<sup>99</sup>

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90. *Id.* at 11.

91. *Id.* at 13 (quoting U.S. CONST. art. II, § 3).

92. *Id.* at 13–14.

93. *Id.* at 14 (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1560, at 415–16 (1833)).

94. *Id.* (citations omitted).

95. *Id.* at 16.

96. *Id.* at 17–18 (quoting *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936)).

97. *Id.* at 18 (citing U.S. CONST. art. II, § 2, cl. 2).

98. *Id.* at 22.

99. *Id.* (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1560, at 417 (1833) ("The [C]onstitution has expressly invested the executive with power to receive ambassadors, and other ministers. It has not expressly invested [C]ongress with the power, either to repudiate or acknowledge them.")).

Because recognition decisions require careful judgments about whether the state or government exists and controls a particular territory, and how recognition would affect United States foreign relations, the executive is far better positioned than Congress to make such decisions.<sup>100</sup> A shared arrangement would create friction between the branches and uncertainty, preventing the nation from responding to international events with clarity and decisiveness.<sup>101</sup>

Kerry asserts that from the Washington administration to the present, Presidents have made hundreds of recognition decisions unilaterally.<sup>102</sup> In addition, the Secretary contends that the President's recognition power has always been understood to include the authority to determine the territorial boundaries of a foreign state.<sup>103</sup> These determinations, he explains, often have national security implications.<sup>104</sup> He claims that Congress has repeatedly acquiesced to the President's recognition power, citing, for example, the House's failed 1864 attempt to pass a resolution acknowledging the Emperor of Mexico, and the Senate's abandoned 1896 attempt to create a joint resolution recognizing the independence of Cuba.<sup>105</sup> Kerry asserts that Zivotofsky's attempts to demonstrate that Congress has exercised recognition power are unavailing, because in each instance, Congress's actions were consistent with recognition determinations already made by the President.<sup>106</sup>

Kerry further contends that the Supreme Court and individual Justices have repeatedly stated that the executive has sole authority to make recognition decisions.<sup>107</sup> In 1817, Chief Justice Marshall, sitting as a Circuit Justice, declined to recognize Buenos Aires because the executive had never recognized it.<sup>108</sup> In 1838, Justice Story, also while sitting as a Circuit Justice, wrote, "[i]t is very clear, that it belongs exclusively to the executive department of our government to

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100. *Id.* at 23 (citing *Curtiss-Wright*, 299 U.S. at 320 (the President "has his confidential sources of information" and "his agents in the form of diplomatic, consular and other officials.")).

101. *Id.* at 25–26.

102. *Id.* at 27.

103. *Id.* at 29.

104. *Id.*

105. *Id.* at 31–33 (citations omitted).

106. *Id.* at 36.

107. *Id.* at 39.

108. *Id.* at 39–40 (quoting *United States v. Hutchings*, 26 F. Cas. 440, 442 (C.C.D. Va. 1817)).

recognise, from time to time, any new governments.”<sup>109</sup> Kerry cites a number of Supreme Court precedents, which he states, reaffirm this point.<sup>110</sup> He explains that the reason that these precedents do not specifically address a congressional attempt to constrain the President’s recognition power is that Congress has historically acquiesced to the President.<sup>111</sup>

## 2. Section 214(d) Unconstitutionally Interferes with the President’s Exclusive Recognition Power

Kerry asserts that section 214(d) impermissibly requires the executive, upon request by individual citizens, to treat Jerusalem as within Israeli sovereignty in issuing United States passports, which are official documents addressed to foreign sovereigns.<sup>112</sup> Because passports constitute a form of diplomatic communication, the executive has long used its inherent constitutional recognition authority in regard to the content of passports to ensure that birthplace designations conform to the President’s recognition decisions.<sup>113</sup>

The Secretary further asserts that Congress has historically acknowledged the executive’s broad authority over the content and use of passports.<sup>114</sup> Congress has exercised its powers over foreign commerce and border control by enacting statutes requiring passports for certain travel, limiting particular persons’ travel, and prohibiting application fraud and passport tampering.<sup>115</sup> None of these statutes purport to regulate passports’ content, much less content relating to foreign relations matters.<sup>116</sup>

Kerry argues that section 214(d) unconstitutionally encroaches upon the President’s recognition authority by requiring him to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns.<sup>117</sup> He explains that the decision of how to describe place of birth necessarily operates as an official statement of the United States’s recognition policy for that

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109. *Id.* at 40 (quoting *Williams v. Suffolk Ins. Co.*, 29 F. Cas. 1402, 1404 (C.C.D. Mass. 1838)).

110. *Id.* (citations omitted).

111. *Id.*

112. *Id.* at 42.

113. *Id.*

114. *Id.* at 46.

115. *Id.* (citations omitted).

116. *Id.* at 47.

117. *Id.* at 48.

particular area.<sup>118</sup> Section 214(d), Kerry explains, would alter the executive's policy toward Jerusalem by forcing it to issue passports acknowledging Israel's sovereignty over Jerusalem.<sup>119</sup> Finally, Kerry argues that the D.C. Circuit's decision was correct even in light of the *Youngstown* framework, because despite the President's diminished power when acting contrarily to the will of Congress, Congress's will lacks legality here because it impermissibly intrudes upon the President's exclusive recognition power.<sup>120</sup>

## V. ANALYSIS

While the D.C. Circuit's ultimate conclusion that section 214(d) impermissibly encroaches on executive prerogative might have a basis in constitutional intent, the opinion itself falls short of justifying such an impactful ruling. The court quickly glazed over the issue of whether section 214(d) constitutes an actual foreign recognition policy decision, and in doing so, failed to properly consider a significant threshold issue which seems taken for granted without adequate support. In addition, the court relied upon erroneous grounds for finding the existence of an exclusive executive recognition power, taking into account the Secretary's weak arguments for a constitutional foundation and improperly relying upon irrelevant dicta.

### A. *The D.C. Circuit did not State Sufficient Grounds to Determine that a Place-of-Birth Passport Designation Constitutes an Official Recognition Decision*

The question of whether a foreign policy determination made by Congress impermissibly encroaches upon a Presidential power need not be reached if, in fact, section 214(d) is not making a foreign policy determination. Indeed, neither the D.C. Circuit nor the Secretary of State have articulated sufficient grounds for concluding that a passport's place of birth designation constitutes an official foreign recognition decision which would have the effect of changing foreign policy.

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118. *Id.* at 49.

119. *Id.* at 52.

120. *Id.* at 58 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952)).

As support for its determination that section 214(d) is a foreign policy decision, the D.C. Circuit cited to both the title and legislative history of section 214 in its entirety.<sup>121</sup> However, as Zivotofsky explains, the other subsections pertain to the location of the United States embassy in Israel, a topic separate from that of passport designations.<sup>122</sup> Supreme Court precedent indicates that the constitutionality of one subsection of a statute should be determined separately from that of the other provisions.<sup>123</sup> In addition, Zivotofsky notes that the Supreme Court's ruling in *National Federation of Independent Business v. Sebelius*<sup>124</sup> establishes that Congress's characterization of a law does not necessarily control its constitutionality.<sup>125</sup>

Moreover, the State Department itself does not definitively assert that the provision at issue is a policy determination. For example, the Secretary explained in interrogatories that 214(d) is unconstitutional because the executive does not “engag[e] in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem . . . .”<sup>126</sup> The fact that the provision merely “might be perceived as constituting recognition” can hardly be tantamount to an official foreign recognition decision that would have the force of amending an executive foreign policy. As Zivotofsky notes, the State Department's rejection of the provision apparently rests upon the concern that Palestinians may mistakenly interpret it as a dramatic reversal of United States foreign policy.<sup>127</sup> This concern in itself necessarily includes the admission that the provision would not *actually* constitute a reversal of foreign policy. The Secretary provides no support for the contention that allaying fears about the

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121. *Zivotofsky VI*, 725 F.3d 197, 217–18 (D.C. Cir. 2013) (citations omitted).

122. Brief for the Petitioner, *supra* note 55, at 19.

123. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (“[W]e agree with the Government that the unconstitutional tenure provisions are severable from the remainder of the statute.”); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006) (“Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer . . . to enjoin only the unconstitutional applications . . . while leaving other applications in force.”).

124. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593–94 (2012) (holding that, despite Congress's assertions that minimum coverage provision of the Affordable Care Act was a “penalty” authorized under the Commerce Clause, the Court could find congressional authority under the taxing power instead because the Court's “plain duty” is to adopt an interpretation “which will save the Act”) (citation omitted).

125. Brief for the Petitioner, *supra* note 55, at 20 (citing *Sebelius*, 132 S. Ct. at 2593–94).

126. *Zivotofsky VI*, 725 F.3d at 200 (citation omitted).

127. Brief for the Petitioner, *supra* note 55, at 63 (citation omitted).

amendment of a United States foreign policy is a necessary means of maintaining the policy.

The Secretary also does little to reconcile its past treatment of other disputed territories in regard to passports with its current treatment of Jerusalem. Instead, he baldly asserts that the Department's policy prohibits "listing a country whose sovereignty over the relevant territory the United States does not recognize."<sup>128</sup> As Zivotofsky points out, the Foreign Affairs manual permits the listing of such territories as "Taiwan" and "Palestine" as places of birth on passports despite the fact that the United States has never recognized these territories as foreign sovereigns.<sup>129</sup> The Secretary attempts to explain this away with the assertions that the Department allows a "city or area" to be listed for disputed territories, and that listing "Taiwan" is consistent with United States policy, which recognizes Taiwan as a mere part of China.<sup>130</sup> However, to some, Taiwan *is* a country and a sovereign. Would not listing "Taiwan" as a place of birth on a passport then essentially acknowledge a country's sovereignty over territory that the United States has never officially recognized?

Apparently the State Department did acknowledge this as a concern, because it issued a foreign policy declaration accompanying the Taiwan legislation stating that its policy toward Taiwan had not changed.<sup>131</sup> Why then, as Zivotofsky suggests, could the State Department not comply with section 214(d), which, albeit for slightly different political reasons, would also have the effect of listing a country whose sovereignty over the territory the United States does not recognize, while similarly issuing a foreign policy declaration clarifying that the United States recognition policy toward Jerusalem had not changed?<sup>132</sup> It seems that such special treatment of Jerusalem warrants stronger justification from the Secretary should he be permitted to reject section 214(d).

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128. Brief for the Respondent in Opposition at 22, *Zivotofsky v. Kerry*, No. 13-628 (U.S. Feb. 21, 2014).

129. Brief for the Petitioner, *supra* note 55, at 25.

130. Brief for the Respondent, *supra* note 88, at 50–51.

131. See Brief for the Petitioner, *supra* note 55, at 13 ("State Department cable 299832, sent on November 5, 1994 . . . added, 'The U.S. recognizes the Government of the People's Republic of China as the sole legal government of China, and it acknowledges the Chinese position that there is only one China and Taiwan is a part of China.'").

132. *Id.* at 22.



*B. There is an Insufficient Basis for Concluding that Executive Recognition Power is Exclusive*

Even if the Supreme Court does find sufficient basis to conclude that section 214(d) constitutes an amendment to United States foreign recognition policy toward Jerusalem, there is currently a dearth of evidence demonstrating that the executive has broad *exclusive* authority to set foreign recognition policy, and as such, that section 214(d) would violate separation of powers.

While Secretary Kerry never asserts that there is any explicit foundation for an exclusive presidential recognition power in the Constitution, he continues to argue that the “primary source” of this power is the “receive ambassadors” clause of Article II.<sup>133</sup> He explains that because the President’s exclusive power to receive an ambassador includes the power to decide whether to establish diplomatic relations with that ambassador’s countries of origin, “the recognition power is vested *solely* in the President.”<sup>134</sup> This argument is logically flawed, because it incorrectly assumes that receiving ambassadors is the *only* means of recognizing a foreign nation. Kerry himself seems to admit this later on in the same argument, when he explains, “[s]imilarly, the President has the power to ‘make Treaties’ *with the advice and consent of the Senate . . .* in a manner that fully accords with his recognition policy.”<sup>135</sup> Here, the Secretary appears to acknowledge another form of recognition decision, while simultaneously admitting that the President cannot act unilaterally in implementing it.

The Secretary’s principal remaining arguments for exclusive executive recognition power are that Congress is not equipped to handle recognition decisions,<sup>136</sup> and that several Supreme Court justices has spoken to this effect.<sup>137</sup> These arguments are tenuous at best. While the many historical examples he cites of early

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133. Brief for the Respondent, *supra* note 88, at 13 (citation omitted).

134. *Id.* at 13–14 (emphasis added).

135. *Id.* at 19 (emphasis added).

136. Brief for the Respondent, *supra* note 88, at 22–23.

137. Respondent’s references to Supreme Court Justice’s decisions while sitting in Circuit courts (Brief for the Respondent, *supra* note 88, at 39–40) carry little, if any, weight. *See* *United States v. Price*, 50 U.S. 83, 92–93 (1850) (noting that although Justice Story’s decision while sitting in Circuit court was “entitled to high respect[,]” it “is not binding in its authority upon this court”). In addition, in *Hutchings*, the court concluded only that the *judiciary* could not recognize the independence of a foreign nation. *See* *United States v. Hutchings*, 26 F. Cas. 440, 442 (C.C.D. Va. 1817) (observing that “it was not competent to the court” to pronounce the independence of Buenos Aires, which the executive “had never recognized”).

constitutional interpretations make a strong case that the President does have some inherent foreign recognition power,<sup>138</sup> they fail to establish that this power is exclusive. In addition, by criticizing Zivotofsky’s position because “the Constitution’s text prescribes no role for the Congress in recognition decisions,” the Secretary places a higher burden upon Zivotofsky than upon himself, because he does not allege any explicit constitutional support for his argument either.

The D.C. Circuit, which ultimately sided with the Secretary, did acknowledge that “[n]either the text of the Constitution nor originalist evidence provides much help in answering the question of the scope of the President’s recognition power.”<sup>139</sup> However, it adopted the Secretary’s interpretations of early post-ratification historical examples, which do nothing to elucidate the full range of the executive’s recognition power.<sup>140</sup> As Professor Robert Reinstein has noted, every post-ratification example the D.C. Circuit cited for an exclusive recognition power either proved only that the executive has *some* non-exclusive recognition power, or even that executive power is subordinate to congressional recognition power.<sup>141</sup> As such, if the Supreme Court does declare an exclusive Presidential foreign recognition power, it will need to draw upon stronger constitutional grounds than the Secretary’s constitutional arguments provide.

In rendering its decision, the D.C. Circuit also relied heavily upon Supreme Court dicta, explaining that “carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative[.]”<sup>142</sup> Despite admitting that the Supreme Court has never held that the President holds exclusive recognition authority, it claimed that Supreme Court has stated such in dicta.<sup>143</sup> However, the court’s reliance upon dicta was misplaced. As Judge Tatel noted in his concurrence, neither party, nor any of the amici, have been able to point to a time in our history when the President

138. See, e.g., Brief for the Respondent, *supra* note 88, at 20–21.

139. *Zivotofsky VI*, 725 F.3d 197, 206 (D.C. Cir. 2013).

140. See *id.* at 207–10 (“Beginning with the administration of our first President, George Washington, the Executive has believed that it has the exclusive power to recognize foreign nations”).

141. Recent Case, *Constitutional Law—Separation of Powers—D.C. Circuit Holds That Recognition of Foreign Governments Is an Exclusive Executive Power.*—*Zivotofsky v. Secretary of State*, 725 F.3d 197 (D.C. Cir. 2013), 127 HARV. L. REV. 2154, 2160 (2014) (citing Robert J. Reinstein, *Is the President’s Recognition Power Exclusive?*, 86 TEMP. L. REV. 1 (2013)).

142. *Zivotofsky VI*, 725 F.3d at 212 (citation omitted).

143. *Id.*

and Congress have clashed over an issue of recognition.<sup>144</sup> As such, none of the cases the court cited provided any insight as to the scope of the President's recognition authority within the third category of the *Youngstown* framework.<sup>145</sup>

In fact, of the six Supreme Court opinions that the D.C. Circuit cited, five never stated, even in dicta, that the President's recognition power is exclusive and thus not subject to any contrary acts of Congress.<sup>146</sup> Five of the cases merely asserted the dominance of the President's recognition power over the judiciary, while another explained only that the President could implement recognition decisions in the absence of the Senate's advice and consent.<sup>147</sup> In using this erroneously interpreted dicta as its primary basis for reaching the conclusion that the President holds exclusive recognition authority, the court skirted a necessary discussion regarding where the separation of power actually lies between the executive and legislative branches when it comes to foreign recognition decisions.<sup>148</sup>

### C. *Likely Disposition*

The Supreme Court's repeated use of the *Youngstown* framework, including in its recent *Medellin v. Texas*<sup>149</sup> decision, strongly suggests that it will apply the framework in this case. This means that it will likely evaluate whether or not historical evidence supports an exclusive presidential recognition authority strongly enough to overcome Congress's will when the President's power is "at its lowest ebb."<sup>150</sup> As the Secretary correctly notes, this likely can be done if section 214(d) is found to constitute legislation beyond the outer bounds of Congress's constitutional authority.<sup>151</sup> Whether the Supreme Court will reach this holding is somewhat unclear in light of the notable absence of precedent illuminating this particular tension between the legislative and executive branches.

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144. *Id.* at 222.

145. *Constitutional Law*, *supra* note 141, at 2159.

146. *Id.* at 2161 (citations omitted).

147. *Id.* at 2161–62 (citations omitted).

148. *Id.* at 2162.

149. *Medellin v. Texas*, 128 S. Ct. 1346, 1350 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area.").

150. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952).

151. See Brief for the Respondent, *supra* note 88, at 58 ("Contrary to the amici House Members' argument . . . holding Section 214(d) unconstitutional would not suggest that Congress's proper exercise of its enumerated powers cannot touch on subjects that relate to recognition.").

On the one hand, no Supreme Court dicta appear to strongly support the concept of an exclusive presidential recognition power beyond the reach of congressional intervention. The “sole organ” dictum upon which the D.C. Circuit largely relied has been historically misinterpreted.<sup>152</sup> In making the original statement, evidence suggests that Chief Justice Marshall was discussing only the President’s power to execute a treaty absent congressional instruction.<sup>153</sup> He never claimed exclusive executive recognition power, but rather, supported Congress’s ability to intervene in foreign policy matters.<sup>154</sup> Moreover, other Supreme Court dicta appear to contradict the theory of exclusive executive recognition authority, stating “Congress and the President share . . . [recognition] power.”<sup>155</sup>

However, the Court may ultimately be persuaded by existing scholarly arguments favoring a broad reading of the President’s authority over matters concerning diplomacy.<sup>156</sup> Such arguments explain that the President enjoys a “residual” foreign affairs power under Article II, Section 1’s grant of the “executive Power[.]”, and that leading political writers of the founding era, including Locke, Montesquieu, and Blackstone, expressed that the executive power included broad foreign affairs powers.<sup>157</sup> In addition, the explicit allocations of some foreign affairs powers to other government bodies, such as the power to declare war to Congress, may constitute evidence of the outer bounds of the President’s foreign affairs authority, which may otherwise be all-encompassing.<sup>158</sup>

## CONCLUSION

*Zivotofsky* presents a unique dilemma to the Supreme Court in that it will force it to define, for the first time, the boundaries of legislative and executive power in matters of foreign recognition. Ambiguities in dicta and a stark absence of analogous historical examples will prevent the Court from drawing upon the security of well-established precedent and venerated pillars of constitutional

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152. *Constitutional Law*, *supra* note 141, at 2160–61.

153. *Id.* at 2161.

154. *Id.*

155. *See id.* at 2162 (citations omitted); Brief for the Petitioner, *supra* note 55, at 59 (citations omitted).

156. *See generally* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 *YALE L.J.* 231 (2001).

157. *Id.* at 234.

158. *Id.* at 235.

interpretation. Instead, the Supreme Court will have to fulfill its ultimate role in examining what relationship, if any, the Constitution envisioned between these two branches in regard to foreign affairs, and what historical practice has suggested the future should hold for the implementation of so many crucial United States recognition decisions.