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# *Zivotofsky v. Kerry*: The Jerusalem Passport Case

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## Summary

The Supreme Court has agreed to review an important separation-of-powers case pitting Congress's foreign affairs powers against the President's power to recognize foreign governments. The U.S. Court of Appeals for the D.C. Circuit held in *Zivotofsky v. Secretary of State* that the President's recognition power is exclusive and trumps Congress's authority to regulate passports. The Court's decision could have broad implications for Congress's role in foreign affairs.

Successive U.S. Administrations have maintained that the status of Jerusalem is a matter to be resolved between Israel and the Palestinians. Congress has consistently urged the President to recognize Jerusalem as the capital of Israel. In 2002 Congress passed a measure that gave U.S. citizens born in Jerusalem the option of having Israel recorded as their place of birth on their passports, P.L. 107-228 §214(d). The State Department policy has been to list only "Jerusalem" on passports in such cases, omitting any reference to country. On signing the act into law, President George W. Bush wrote in an accompanying signing statement that this and other provisions on Jerusalem would, "if construed as mandatory ... impermissibly interfere with the president's constitutional authority to conduct the nation's foreign affairs."

When Menachem Zivotofsky's parents sought to invoke the measure to have their son's birthplace recorded as "Jerusalem, Israel," the State Department refused. The Zivotofskys took their request to court, seeking an order to have the passport reissued with the place of birth listed as Israel in conformance with the statute. The case was first rejected on the basis of standing and then on the basis of the political question doctrine, but the Supreme Court reinstated the case in 2012, *Zivotofsky v. Clinton*, finding there to be no political question and directing the appellate court to examine the "textual, structural, and historic evidence" to determine the nature of the President's recognition power and Congress's passport power.

This report briefly describes legislative efforts to modify U.S. policy with respect to Jerusalem, in particular multiple enactments of the passport provision. The report summarizes the appellate court's opinion finding the passport measure unconstitutional and presents brief synopses of the petitioner's argument before the Supreme Court, the Secretary of State's brief in response, and briefs of amici curiae submitted by the Senate (pursuant to S.Res. 504) and by some Members of the House of Representatives. Finally, the report concludes by suggesting some factors that may affect the outcome.

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## Background

The Supreme Court has agreed to review an important separation-of-powers case pitting Congress's foreign affairs powers against the President's power to recognize foreign governments. The U.S. Court of Appeals for the D.C. Circuit held in *Zivotofsky v. Secretary of State*<sup>1</sup> that the President's recognition power is exclusive and trumps Congress's authority to regulate passports. The Court's decision could have broad implications for Congress's role in foreign affairs.

Successive U.S. Administrations have maintained that the status of Jerusalem is a matter to be resolved between Israel and the Palestinians.<sup>2</sup> Congress has consistently urged the President to recognize Jerusalem as the capital of Israel. In 2002 Congress passed a measure that gave U.S. citizens born in Jerusalem the option of having Israel recorded as their place of birth on their passports. The State Department policy has been to list only "Jerusalem" on passports in such cases, omitting any reference to country. On signing the act into law, President George W. Bush wrote in an accompanying signing statement that this and other provisions on Jerusalem would, "if construed as mandatory ... impermissibly interfere with the president's constitutional authority to conduct the nation's foreign affairs."<sup>3</sup>

When Menachem Zivotofsky's parents sought to invoke the measure to have their son's birthplace recorded as "Jerusalem, Israel," the State Department refused. The Zivotofskys took their request to court, seeking an order to have the passport reissued with the place of birth listed as Israel in conformance with the statute. The case was first rejected on the basis of standing<sup>4</sup> and then on the basis of the political question doctrine,<sup>5</sup> but the Supreme Court reinstated the case in 2012, finding there to be no political question and directing the appellate court to examine the "textual, structural, and historic evidence" to determine the nature of the President's recognition power and Congress's passport power.<sup>6</sup>

This report briefly describes legislative efforts to modify U.S. policy with respect to Jerusalem, in particular multiple enactments of the passport provision. The report also summarizes the appellate court's opinion finding the passport measure at issue unconstitutional, and presents brief synopses of the petitioner's argument before the Supreme Court, the Secretary of State's brief in response, and briefs of amici curiae submitted by the Senate and by some Members of the House of Representatives. Finally, the report concludes by suggesting some factors that may affect the outcome.

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<sup>1</sup> 725 F.3d 197 (D.C. Cir. 2013), *cert. granted sub nom. Zivotofsky v. Kerry*, 80 USLW 4260 (2014).

<sup>2</sup> For more information about foreign policy with respect to Jerusalem, see CRS Report RL33476, *Israel: Background and U.S. Relations*, by Jim Zanotti.

<sup>3</sup> Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 38 WEEKLY COMP. PRES. DOC. 1659 (September 30, 2002) (hereinafter "FY2003 FRAA Signing Statement").

<sup>4</sup> *Zivotofsky v. Secretary of State*, 2004 WL 5835212 (D.D.C. 2004) (not reported in F. Supp. 2d), *rev'd*, 444 F.3d 614 (D.C. Cir. 2006).

<sup>5</sup> *Zivotofsky v. Secretary of State*, 511 F. Supp. 2d 97 (D.D.C. 2007), *aff'd*, 571 F.3d 1227 (D.C. Cir. 2009), *rev'd sub nom. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

<sup>6</sup> *Zivotofsky*, 132 S. Ct. at 1430.

## Legislative Efforts to Change Jerusalem Policy

The statutory language at issue in *Zivotofsky v. Kerry* was enacted as part of the Foreign Relations Authorization Act for FY2003 (FY2003 FRAA).<sup>7</sup> Introduced in the House as H.R. 1646, the bill included in Section 235 four measures designed to encourage a change in policy with respect to Jerusalem. The last of these declared that, with respect to a U.S. citizen born in Jerusalem, “the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel” in the citizen’s U.S. passport or consular report of birth abroad.<sup>8</sup> The other three measures reaffirmed Congress’s commitment to the relocation of the embassy from Tel Aviv to Jerusalem. The first urged the President to immediately begin the relocation; the second prohibited authorized funds from being used for the operation of a U.S. consulate in Jerusalem unless that consulate was under the supervision of the U.S. Ambassador to Israel; and the third prohibited authorized funds from being used to publish any official government document that contained a list of countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel. The Senate version of the bill contained no similar provision, but all four measures were included in Section 214 of the conference report.<sup>9</sup> President George W. Bush signed the bill into law on September 30, 2002, but issued a signing statement to indicate that these measures would be construed as advisory only.<sup>10</sup> Moreover, he wrote:

[T]he purported direction in section 214 would, if construed as mandatory rather than advisory impermissibly interfere with the President’s constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.<sup>11</sup>

## The Jerusalem Embassy Act

This was not Congress’s first effort to encourage a change in U.S. policy with respect to Jerusalem.<sup>12</sup> The first subsection of Section 214 echoed a previously enacted provision from the Jerusalem Embassy Act of 1995,<sup>13</sup> which passed into law without the signature of President Clinton. That law provides that the U.S. embassy in Israel “should” be moved to Jerusalem no later than May 31, 1999, and limits the expenditure of State Department funds for building acquisition and maintenance until a new embassy opens in Jerusalem.<sup>14</sup> The statute also includes

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<sup>7</sup> Foreign Relations Authorization Act, Fiscal Year 2003, P.L. 107-228, 116 Stat. 1350 (2002).

<sup>8</sup> H.R. 1646 (as introduced in the House of Representatives, 107th Cong.) §235(d).

<sup>9</sup> H.Rept. 107-671. The report describes Section 214 as containing “four provisions related to the recognition of Jerusalem as Israel's capital.”

<sup>10</sup> See FY2003 FRAA Signing Statement, *supra* footnote 3.

<sup>11</sup> *Id.* The term “purported direction” is probably a reference to Section 214(d) rather than a reference to the section as a whole.

<sup>12</sup> See CRS Report RL33476, *Israel: Background and U.S. Relations*, *supra* footnote 2, for a history of such measures.

<sup>13</sup> Jerusalem Embassy Act of 1995, P.L. 104-45 (1995).

<sup>14</sup> *Id.* §3.

a provision for the President to waive the spending limitations,<sup>15</sup> which Presidents Clinton, Bush, and Obama have consistently exercised.<sup>16</sup>

## Origins of the Jerusalem Passport Provision

Concerns among Members of Congress about the State Department's policy with respect to passports of citizens born in Jerusalem first manifested themselves in legislative proposals in 1997. In May of that year, the passport and other Jerusalem-related provisions were reported out of the House Committee on International Relations as part of the Foreign Policy Reform Act, H.R. 1486 (105<sup>th</sup> Cong.).<sup>17</sup> Representative Lee Hamilton expressed concerns about the Jerusalem language, calling it "unacceptable to the Administration" and to him, and explaining that "[i]t has the potential to do serious damage to the Middle East peace process."<sup>18</sup> No further action was taken on the bill.

Representative Benjamin Gilman, the chairman of the committee, introduced similar provisions as a stand-alone bill, H.R. 2832 (105<sup>th</sup> Cong.). Representative Gilman described the need for the passport provision as "a simple case of fairness, and of righting a wrong."<sup>19</sup> No further action was taken on the bill, but the 105<sup>th</sup> Congress included the language as part of the Foreign Affairs Reform and Restructuring Act of 1998.<sup>20</sup> President Clinton vetoed that bill for other reasons.<sup>21</sup>

The House Committee on International Relations questioned Clinton Administration officials about the Jerusalem passport policy during hearings held in March 1998.<sup>22</sup> The Administration responded:

The practice of entering "Jerusalem" only in the passport is a long-standing one. This is a very difficult issue.

However, given the agreement by Israel and the Palestinians themselves to leave discussion of Jerusalem to the permanent status talks and our determination not to take steps that could undermine permanent status negotiations between the parties, we do not believe that this is an appropriate time to change that practice.

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<sup>15</sup> *Id.* §7.

<sup>16</sup> See CRS Report RL33476, *Israel: Background and U.S. Relations*, *supra* footnote 2.

<sup>17</sup> H.R. 1486 §1710 (105<sup>th</sup> Cong.) In addition to the passport provision, the measure would have authorized expenditures for building an embassy in Jerusalem, prohibited spending on the operation of a consulate in Jerusalem not under the supervision of the U.S. Ambassador to Israel, and prohibited spending on publications that list countries with their capitals unless Jerusalem is listed as Israel's capital.

<sup>18</sup> H.Rept. 105-94.

<sup>19</sup> 143 CONG. REC. 25212 (Nov. 7, 1997) (extension of remarks by Representative Gilman).

<sup>20</sup> H.R. 1757 (105<sup>th</sup> Cong.) §1812. See also H.Rept. 105-432.

<sup>21</sup> See Veto Message for H.R. 1757, 34 WEEKLY COMP. PRES. DOC. 2088 (Oct. 21, 1998) (objecting to restrictions on international family planning programs).

<sup>22</sup> *Developments in the Middle East: Hearing before the Committee on International Relations, House of Representatives*, 105<sup>th</sup> Cong. 131 (1998) (question for the record submitted to Assistant Secretary of State for Near Eastern Affairs Martin S. Indyk). The question submitted was "Please comment on the fact that the passports of American children born in Jerusalem say 'Jerusalem' as place of birth, instead of 'Israel,' when everywhere else in the world the country is listed. Does the Clinton Administration recognize any part of Jerusalem as being part of Israel?"

Israel and the Palestinians have agreed that Jerusalem is one of the issues to be discussed in the permanent status negotiations. It would be counter-productive for the US to take any actions that could be interpreted as prejudging this sensitive issue.<sup>23</sup>

Later in 1998, the Senate passed Jerusalem-related provisions, including the passport-related provision, as part of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1999,<sup>24</sup> but the section was eliminated in conference, H.R. 4276 (105<sup>th</sup> Cong.).

The Jerusalem passport measure was included in a number of bills during the 106<sup>th</sup> Congress,<sup>25</sup> and passed the Senate three times,<sup>26</sup> but was never enacted, apparently due to objections from the Administration.<sup>27</sup> Congress passed H.R. 2670, the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2000, after eliminating the Jerusalem passport provision (which had passed the Senate) in conference, but including two other provisions directed at recognizing Jerusalem as the capital of Israel.<sup>28</sup> President Clinton vetoed the bill, citing the Jerusalem provisions among other objections as the reason.<sup>29</sup> He wrote:

Provisions concerning Jerusalem are objectionable on constitutional, foreign policy, and operational grounds. The actions called for by these provisions would prejudice the outcome of the Israeli-Palestinian permanent status negotiations, which have recently begun and which the parties are committed to concluding within a year.<sup>30</sup>

## Reenactment of the Passport Provision

After its initial enactment in the 107<sup>th</sup> Congress, the Jerusalem passport provision was enacted again in a number of spending bills. The 108<sup>th</sup> Congress enacted the Jerusalem passport provision three times, in some cases evoking protests from the executive branch. In 2003, the Jerusalem passport measure was adopted as Section 404 (Div. B) of the Consolidated Appropriations Resolution.<sup>31</sup> President George W. Bush objected to a number of provisions as unconstitutionally

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<sup>23</sup> *Id.*

<sup>24</sup> S. 2260 (105<sup>th</sup> Cong.). The measure was added as a floor amendment, S.Amdt. 3278.

<sup>25</sup> See H.R. 4690 (reported in Senate, 106<sup>th</sup> Cong.), H.R. 2768 (introduced in the House, 106<sup>th</sup> Cong.), H.R. 2785 (introduced in the House, 106<sup>th</sup> Cong.), H.R. 2529 (introduced in the House, 106<sup>th</sup> Cong.), H.R. 2515, (introduced in the House, 106<sup>th</sup> Cong.).

<sup>26</sup> S. 886 (engrossed in Senate, 106<sup>th</sup> Cong.), H.R. 2670 (engrossed in Senate, 106<sup>th</sup> Cong.), H.R. 2415 (engrossed in Senate, 106<sup>th</sup> Cong.).

<sup>27</sup> See 145 CONG. REC. E2529 (1999) (remarks of Representative Gilman on H.R. 3194) (expressing regret that the Administration had demanded that the four Jerusalem provisions be dropped from the final bill).

<sup>28</sup> H.R. 2670 (enrolled bill, 106<sup>th</sup> Cong.) §§406-07 (cutting off funds for the operation of a U.S. consulate in Jerusalem unless it is under the supervision of the U.S. Ambassador to Israel and cutting off funds for publications that list countries and their capitals unless they identify Jerusalem as Israel's capital).

<sup>29</sup> Message to the House of Representatives Returning Without Approval the “Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2000,” 35 WEEKLY COMP. PRES. DOC. 2152 (October 25, 1999).

<sup>30</sup> *Id.* at 2153.

<sup>31</sup> P.L. 108-7, 117 Stat. 92. The measure originated as part of the Senate amendment, which also included two provisions similar to Section 214(b) and (c) of the FY2003 FRAA, but these were excised in conference. The conference report does not indicate any intent to change recognition policy with respect to Jerusalem. H.Rept. 108-10 notes only that the conference agreement “includes section 404 regarding the recording of place of birth on certain passport applications.”

impeding his ability to conduct foreign affairs, but did not single out the Jerusalem passport provision among them.<sup>32</sup> The provision was also included in the Consolidated Appropriations Act for 2004.<sup>33</sup> President Bush listed the section among those deemed objectionable for purporting to “direct or burden the Executive’s conduct of foreign relations.”<sup>34</sup> Later that year, the identical provision was included in the Consolidated Appropriations Act for 2005 as Section 406 (Div. B).<sup>35</sup> President Bush again indicated in a signing statement that Section 406, among other provisions, would be construed as advisory because it “purport[ed] to direct or burden the Executive’s conduct of foreign relations....”<sup>36</sup> One effort to prohibit expenditures “in contravention of the provisions of Section 214(d) of the [FY2003 FRAA]” was adopted by the House,<sup>37</sup> but was not included in the final consolidated appropriations bill.

The House of Representatives of the 109<sup>th</sup> Congress passed a measure to codify the Jerusalem passport provision as part of the statute authorizing the Secretary of State to issue passports.<sup>38</sup> The legislation would have clarified that the congressional power to enact such a provision stems from Article I, §8 of the Constitution “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.” The Senate did not take up the bill.

The 109<sup>th</sup> Congress later enacted the Jerusalem passport provision as Section 405 of the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006.<sup>39</sup> This time, President Bush cited his authority to recognize foreign states among the reasons for objecting to that provision.<sup>40</sup> The 110<sup>th</sup> Congress passed the identical provision as Section 107 (Div. J) of the Consolidated Appropriations Act, 2008.<sup>41</sup> In a brief signing statement, the President wrote:

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<sup>32</sup> Statement on Signing the Consolidated Appropriations Resolution, 2003, 39 WEEKLY COMP. PRES. DOC. 227 (Feb. 20, 2003).

<sup>33</sup> P.L. 108-199 Div. B, §404, 118 Stat. 86. The provision appears to have been added in conference. H.Rept. 108-401 notes only that the conference agreement “includes section 404 regarding the recording of place of birth on certain passport applications.”

<sup>34</sup> Statement on Signing the Consolidated Appropriations Act, 2004, 40 WEEKLY COMP. PRES. DOC. 137 (Jan. 23, 2004).

<sup>35</sup> P.L. 108-447, 118 Stat. 2903. The provision appears to have been added in conference, again without much explanation. *See* H.Rept. 108-792.

<sup>36</sup> Statement on Signing the Consolidated Appropriations Act, 2005, 40 WEEKLY COMP. PRES. DOC. 2924 (Dec. 8, 2004).

<sup>37</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2005, H.R. 4754 §802 (Engrossed in the House). This provision appears to have been intended to prevent the State Department and Justice Department from defending against lawsuits attempting to enforce the original Jerusalem passport provision. *See* 150 CONG. REC. H5373 (daily ed. July 8, 2004) (statement of Congressman Weiner).

<sup>38</sup> Foreign Relations Authorization Act for FY2006 and FY2007, H.R. 2601 §209 (as engrossed by the House, 109<sup>th</sup> Cong.).

<sup>39</sup> P.L. 109-108, 119 Stat. 2326. The provision appears to have been added in conference, again with little explanation. *See* H.Rept. 109-272.

<sup>40</sup> Statement on Signing the Science, State, Justice, Commerce, and Related Agencies Appropriations, 41 WEEKLY COMP. PRES. DOC. 1764 (Nov. 22, 2005) (“The executive branch shall construe as advisory the provisions of the Act that purport to direct or burden the Executive’s conduct of foreign relations, including the authority to recognize foreign states and negotiate international agreements on behalf of the United States, or limit the President’s authority as Commander in Chief. These provisions include sections 405...”).

<sup>41</sup> P.L. 110-161, 121 Stat. 2287. The provision appears to have been added as an amendment by the Senate.



[T]his legislation contains certain provisions similar to those found in prior appropriations bills passed by the Congress that might be construed to be inconsistent with my Constitutional responsibilities. To avoid such potential infirmities, the executive branch will interpret and construe such provisions in the same manner as I have previously stated in regard to similar provisions.<sup>42</sup>

## Current Status of the Passport Provision

Despite continued interest in moving the embassy to Jerusalem and recognizing the city as Israel's capital, Congresses subsequent to the 110<sup>th</sup> Congress do not appear to have expressly considered the Jerusalem passport measure. Some bills introduced during that time appear to presume that the original provision from the FY2003 FRAA continues in force.<sup>43</sup> It is not clear, however, whether Section 214(d) of the FY2003 FRAA was intended to be permanent law or whether it expired at the end of the period for which appropriations were authorized. It appears that the Office of the Law Revision Counsel, which did not codify the provision in the U.S. Code, considered the measure to be temporary. Subsections 214(b) and (c) were clearly applicable only to funds authorized under the FY2003 FRAA. The fact that subsequent congresses enacted the same measure in a series of appropriations bills suggests that Section 214(d) of the FY2003 FRAA was not thought to be permanent. Whether the provision is permanent does not matter for the resolution of the issue before the Court, but could have an impact on the foreign policy implications of the provision if it is held to be within Congress's power to enact.

## Zivotofsky v. Secretary of State

After the Supreme Court found the case's resolution was not inhibited by the political question doctrine and remanded it to the D.C. Circuit, a three-judge panel considered on the merits whether to order the State Department to reissue Zivotofsky's passport with "Israel" listed as the place of birth. Instead, the court unanimously struck the Jerusalem passport measure in Section 214(d) as an unconstitutional infringement of the President's recognition power—a power not mentioned in the Constitution but which is widely thought to be derived from the President's Article II obligation to "receive Ambassadors and other public Ministers...."<sup>44</sup> The court and both parties agreed that the case falls into *Youngstown* category three,<sup>45</sup> meaning the President's refusal

<sup>42</sup> Statement on Signing the Consolidated Appropriations Act, 2008, 43 WEEKLY COMP. PRES. DOC. 1638 (Dec. 26, 2007).

<sup>43</sup> See H.Con.Res. 48. (113<sup>th</sup> Cong.) ("Whereas the Foreign Relations Authorization Act, Fiscal Year 2003 (P.L. 107-228) directs that the Secretary of State shall, upon the request of a citizen or a citizen's legal guardian, record the place of birth of a United States citizen born in the city of Jerusalem as Israel...."); see also H.Con.Res. 271 (111<sup>th</sup> Cong.); H.Con.Res. 5 (112<sup>th</sup> Cong.).

<sup>44</sup> See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §204, cmt. a.

<sup>45</sup> *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Justice Jackson described the judicial deference to be accorded to executive branch actions as depending on congressional authorization:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possess in his own right plus all that Congress can delegate. . . .
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .
3. When 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

(continued...)

to carry out the provision at issue would be constitutional only in the exercise of exclusive executive power where Congress is completely disabled from acting upon the subject. After describing the facts of the case and the legislative provision at issue, the court turned to the “textual, structural, and historical evidence” as directed by the Supreme Court.

## The Recognition Power

The appellate court defined recognition as “the act by which ‘a state commits itself to treat an entity as a state or to treat a regime as the government of a state.’”<sup>46</sup> Recognition is an acknowledgement that “the government in question speaks as the sovereign authority for the territory it purports to control.”<sup>47</sup> Entities recognized as states receive certain benefits, such as the right to sue in the courts of the recognizing state,<sup>48</sup> to assert the defense of sovereign immunity in such courts,<sup>49</sup> and to benefit from the “act of state” doctrine.<sup>50</sup>

The court did not accept the view that the constitutional text is dispositive in resolving the origin of the power to recognize foreign nations.<sup>51</sup> While the executive branch argued that the recognition power stems directly from the reception clause, the court did not find it so obvious and looked to ratification-era texts for confirmation. It found little evidence among historical documents from the time the Constitution was framed that would shed light on the clause’s full meaning.

Post-ratification history, however, tipped the scales in favor of the President, as the court viewed it. The court noted that Presidents since Washington have believed themselves to be endowed with the exclusive power to recognize foreign nations, and that Congress for the most part had acquiesced to the notion. Historical evidence to the contrary was deemed unconvincing.<sup>52</sup> With respect to the few cases in which Congress had legislated in matters touching upon the recognition of foreign sovereigns or the President had expressed a desire for congressional support in such a matter, the court pointed out that Congress had not attempted to recognize a foreign government on its own, but had appropriated funds in support of the exercise of presidential power.<sup>53</sup>

The court then turned to judicial precedent on the matter of recognizing foreign governments. While the Supreme Court has never ruled on the issue, it has assumed in dicta that the President has vast powers over the nation’s foreign relations,<sup>54</sup> including the prerogative to recognize

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(...continued)

any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.

<sup>46</sup> *Zivotofsky*, 725 F.3d at 205 (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 94(1)).

<sup>47</sup> *Id.* (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964)).

<sup>48</sup> *Id.* (citing *Banco Nacional*, 376 U.S. at 408-09; *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938)).

<sup>49</sup> *Id.* (citing *Nat’l City Bank v. Republic of China*, 348 U.S. 356, 359 (1955)).

<sup>50</sup> *Id.* (citing *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303 (1918) (“Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”)).

<sup>51</sup> *Zivotofsky*, 725 F.3d at 206.

<sup>52</sup> *Id.* at 209.

<sup>53</sup> *Id.* at 210.

<sup>54</sup> *Id.* at 211.

foreign governments,<sup>55</sup> albeit never in a case like this one in which a direct congressional challenge to that power is involved. The court gave weight to Supreme Court dicta that suggest the recognition power is exclusively the President's,<sup>56</sup> but dismissed the much smaller set of dicta suggesting a role for the legislature, distinguishing those cases.<sup>57</sup> That the first set of cases was also arguably distinguishable and did not call for *Youngstown* analysis was apparently not considered to be significant.<sup>58</sup>

In finding the recognition power to belong exclusively to the President, the court also suggested that the power is to be construed broadly. Quoting the Supreme Court's decision in *United States v. Pink*,<sup>59</sup> the court stated:

The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees.... That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition. Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts....<sup>60</sup>

## The Passport Power

The court then turned to the question of Congress's "passport power," another power not expressly delineated in the Constitution, but thought to derive from congressional authority over immigration, naturalization, and foreign commerce. The court concluded that this power is not exclusive to Congress but is shared with the President, and explained its view that the exercise of non-exclusive legislative authority in such a way as to infringe on executive authority presents a separation of powers problem.<sup>61</sup> In other words, Congress has the authority to regulate passports, even apparently with respect to how the place of birth is to be indicated,<sup>62</sup> so long as that exercise

<sup>55</sup> *Id.* (citing *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 420 (1839) ("[I]f the executive branch ... assume[s] a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department[.]"); *United States v. Belmont*, 301 U.S. 324, 330 (1937) ("[T]he Executive had authority to speak as the sole organ of th[e] government" in matters of "recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto...."); *Guaranty Trust Co.*, 304 U.S. at 138 ("We accept as conclusive here the determination of our own State Department that the Russian State was represented by the Provisional Government...."); *United States v. Pink*, 315 U.S. 203, 229 (1942) ("The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees.... [including t]h[e] authority ... [to determine] the government to be recognized."); *Baker v. Carr*, 369 U.S. 186, 213 (1962) ("[I]t is the executive that determines a person's status as representative of a foreign government."); *Banco Nacional*, 376 U.S. at 410 ("Political recognition is exclusively a function of the Executive.")).

<sup>56</sup> *Id.* at 212 (explaining that the court, as "an inferior court" must generally regard "'carefully considered language of the Supreme Court, even if technically dictum, ... as authoritative,'" (citing *United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006))).

<sup>57</sup> *Id.* at 213-14 & fn. 13 (dismissing as inapposite, *e.g.*, *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 643 (1818) ([T]he courts of the union must view [a] newly constituted government as it is viewed by the legislative and executive departments of the government of the United States.")).

<sup>58</sup> *See id.* at 218 fn. 17 (the fact that in this case Congress, rather than a state legislature, had passed legislation deemed to infringe on the President's recognition power failed to distinguish it from a line of cases with dicta supporting exclusive presidential power, none of which involved congressional action).

<sup>59</sup> 315 U.S. 203 (1942).

<sup>60</sup> *Zivotofsky*, 725 F.3d at 213 (quoting *Pink*, 315 U.S. at 213) (emphases added by D.C. Cir.).

<sup>61</sup> *Id.* at 216.

<sup>62</sup> *Id.* at 219 & fn. 18 (dismissing the precedential significance of a statute permitting Americans born in Taiwan to (continued...))

of authority does not run counter to the President’s foreign policy with respect to recognition. The court appears to have formulated a corollary to Justice Jackson’s *Youngstown* framework, applicable in the case of exclusive executive power, under which the validity of legislation depends on the extent to which it comports with executive branch policy. What would have been the outcome had the court found Congress’s passport power to be exclusive was not described, but the focus on exclusivity suggests it might have been different if Congress had used, say, its appropriation power.<sup>63</sup>

As to the question whether the Jerusalem passport provision would impinge upon the executive branch’s recognition policy, the court gave deference to the executive branch view that it would interfere, rejecting Zivotofsky’s argument that the measure is simply a neutral regulation of the contents of a passport. The court interpreted Section 214 as a whole, coupled with its legislative history, to indicate that Congress intended to affect Jerusalem’s status.<sup>64</sup> The court declined to consider the views of Members of Congress who submitted a brief,<sup>65</sup> emphasizing that the executive branch was “the one branch of the federal government before” the court. It concluded that the passport measure clashes with the executive branch’s long-standing policy of neutrality on the question of Jerusalem and is therefore unconstitutional.

## Concurring Opinion

Circuit Judge Tatel wrote a concurring opinion to emphasize the unprecedented nature of the case and to note how it might differ from the cases relied on by the court in which it was consistently held that “courts have no authority to second-guess recognition decisions.”<sup>66</sup> The effort by some Members of Congress to persuade the court that the passport measure does not implicate the recognition power, but rather, merely affects the way passport-holders are identified,<sup>67</sup> was more persuasive to him but insufficient to sway his vote. That a passport reflects the personal identity of its holder does not mean that the recognition power is not implicated, he explained.<sup>68</sup>

## Zivotofsky v. Kerry

The case returns to the Supreme Court under the name *Zivotofsky v. Kerry*. The question presented is:

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

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(...continued)

have their place of birth recorded as “Taiwan” rather than “China” on the basis that the State Department implemented it only after determining that compliance was consistent with U.S. policy that Taiwan is part of China). See P.L. 103-236 §132, 108 Stat. 395, *codified as amended at* 22 U.S.C. §2705 note.

<sup>63</sup> U.S. CONST. art I, §9, cl. 7 (“No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law....”).

<sup>64</sup> *Zivotofsky*, 725 F.3d at 218-19.

<sup>65</sup> *Id.* at 219 & fn. 19.

<sup>66</sup> *Id.* at 222 (Tatel, J. concurring).

<sup>67</sup> *Id.* at 223.

<sup>68</sup> *Id.* at 224.

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.”

Numerous amicus briefs have been submitted, mostly in support of the petitioner, including a brief submitted on behalf of the U.S. Senate and a brief submitted by some Members of the U.S. House of Representatives.<sup>69</sup>

## **Petitioner’s Brief**

The petitioner disputes the lower court’s finding that the recognition power belongs exclusively to the President and argues that Section 214(d) is well within Congress’s power to regulate passports.<sup>70</sup> Moreover, the petitioner downplays the possible foreign policy ramifications of the provision if it is enforced and dismisses the lower court’s conclusion that Congress intended for Section 214(d) to have an effect on U.S. policy regarding the recognition of Jerusalem as Israel’s capital. Instead, the petitioner argues that the State Department’s policy regarding passports of American citizens born in Jerusalem does not further its foreign policy with respect to sovereignty over Jerusalem.

To advance his position that the Constitution does not bestow exclusive authority on the President to make determinations recognizing foreign governments’ sovereignty over territory, Zivotofsky notes the absence of constitutional language to that effect and cites early scholarly treatment of the subject that supports a possible congressional role. The petitioner also describes post-ratification historical incidents that he believes demonstrate that the President has not always considered the recognition power to be exclusive, or show that Congress has in fact legislated with respect to matters touching on the recognition of foreign powers. For example, Zivotofsky argues that President Washington’s unilateral acceptance of Edmond Genet as the representative of France following the revolution there demonstrates only that the duty under international law to recognize *de facto* sovereigns fell on the President, in the petitioner’s view, not that Congress could not legislate on the subject if it so chose.

The petitioner lists a number of examples of Congress enacting recognition statutes:

- Congress declared in 1800 that “the whole of the island of Hispaniola shall for the purposes of this act [non-intercourse legislation] be considered as a dependency of the French Republic” at a time when sovereignty over part of the island was disputed between France and Spain.<sup>71</sup>
- Congress in 1806 apparently opposed Haiti’s independence from France by prohibiting commerce with “any person or persons resident within any part of the island of St. Domingo, not in possession, and under the acknowledged

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<sup>69</sup> The briefs of the parties and of amici curiae can be found at <http://www.scotusblog.com/case-files/cases/zivotofsky-v-kerry/>.

<sup>70</sup> Brief for the Petitioner, *Zivotofsky v. Kerry*, No. 13-628 (U.S. July 15, 2014), available online at [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/13-628\\_pet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-628_pet.authcheckdam.pdf).

<sup>71</sup> *Id.* at 38 (citing the Act of Feb. 27, 1800, ch. 10, §7, 2 Stat. 7, 10).

- government of France,<sup>72</sup> undoing the presidential policy of permitting trade with Haiti despite French protests.
- Congress in 1822, on the request of President James Monroe for cooperation between the two branches in the recognition of newly independent nations of Latin America, enacted legislation to fund diplomatic missions to those nations.<sup>73</sup>
  - President Andrew Jackson in 1837 acquiesced to resolutions passed by the House and Senate calling for the recognition of the Republic of Texas.<sup>74</sup>
  - President Zachary Taylor's Secretary of State in 1849 indicated in a letter to a U.S. diplomat that the President would recommend to Congress that a new government be recognized in Hungary if the situation there warranted it (which it apparently never did).<sup>75</sup>
  - In 1861 President Abraham Lincoln, in his first annual message to Congress, requested Congress's approval for the recognition of Haiti and Liberia.<sup>76</sup> Congress responded by enacting legislation to authorize the President to appoint diplomatic representatives to the "Republics of Hayti and Liberia."<sup>77</sup>
  - The House of Representatives in 1864 passed a resolution abhorring any recognition of any government that France might try to establish in Mexico. Secretary of State William Seward instructed the U.S. Minister to France to explain to the French government that the decision of recognition belongs to the President. The House responded with a resolution declaring Congress's constitutional authority to establish policy with respect to the recognition of foreign governments.<sup>78</sup> The Senate did not vote on the resolution.
  - In 1898, Congress overruled President McKinley's policy with respect to Cuba's independence from Spain by enacting a joint resolution declaring that "the people of the Island of Cuba are, and of right ought to be, free and independent."<sup>79</sup>

The petitioner interprets this post-ratification history as establishing that "Congress engaged in legislative recognition of foreign governments and participated in the recognition process."<sup>80</sup>

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<sup>72</sup> *Id.* at 39-40 (citing the Act of Feb. 28, 1806, ch. 9, § 1, 2 Stat. 351, 351; *Clark v. United States*, 5 F. Cas. 932, 934 (C.C.D. Pa. 1811) (interpreting the law of 1806 as a congressional acknowledgement of the sovereignty of France over the island and according it judicial deference)).

<sup>73</sup> *Id.* at 41-45 (citing Act of May 4, 1822, ch. 52, 3 Stat. 678, 678). The D.C. Circuit had interpreted the events surrounding the recognition of the newly independent nations, including the rejection of a bill that would have outright recognized them, as evidence that Congress viewed its authority to recognize foreign governments as wholly foreclosed. *Zivotofsky*, 725 F.3d at 208. The petitioner emphasizes the interbranch cooperation at the suggestion of the President.

<sup>74</sup> Brief for the Petitioner, *supra* footnote 70, at 45-48.

<sup>75</sup> *Id.* at 49-50.

<sup>76</sup> *Id.* at 50.

<sup>77</sup> *Id.*; Act of June 5, 1862, 12 Stat. 421.

<sup>78</sup> Brief for the Petitioner, *supra* footnote 70, at 52-54.

<sup>79</sup> *Id.* at 55 (citing the Act of Apr. 20, 1898, ch. 24, 30 Stat. 738 (1898)). The Court of Appeals interpreted this legislation as congressional acquiescence to the President because language recognizing the Republic of Cuba as the proper government was dropped. *Zivotofsky*, 725 F.3d at 208-209. The petitioner emphasizes Congress's repudiation of Spanish sovereignty over the island.

<sup>80</sup> Brief for the Petitioner, *supra* footnote 70, at 56.



The petitioner's brief next takes issue with the appellate court's interpretation of Supreme Court dicta as controlling. The brief emphasizes that the cases cited in support of the President's exclusive recognition power do not involve disagreements between the executive branch and Congress. Rather, these cases involve a determination of the Judiciary's role in recognition where Congress has remained silent. Petitioner also criticizes the appellate opinion for minimizing the importance of dicta that can be interpreted to support his position.

The petitioner's brief argues that the executive branch policy of listing "Jerusalem" on passports in violation of Section 214(d) should be reviewed under a standard commensurate with the *Youngstown* test, with less deference accorded the President since his power is at its "lowest ebb." The Jerusalem passport policy, according to the petitioner, cannot withstand such strict scrutiny because it is based on a mistaken fear that Palestinians will interpret compliance with Section 214(d) as a change in policy amounting to the recognition of Jerusalem as belonging entirely to Israel. This fear, the brief suggests, is overblown because the provision does not require that Israel be listed as the place of birth for citizens born in Jerusalem, it merely provides the option. State Department policy permits citizens born in other parts of Israel the option of listing a locality as the place of birth rather than the country, with no apparent foreign policy backlash. Finally, border officials who review the passport of a Jerusalem-born citizen who has chosen to have Israel listed as the place of birth will have no way of knowing where in Israel the passport bearer was born and thus will be unable to discern any official statement with respect to the status of Jerusalem. (The petitioner also notes that passports of Jerusalem-born citizens have sometimes mistakenly indicated Israel as the place of birth in the past, with no resulting foreign policy problems.)<sup>81</sup>

## Secretary of State's Brief

The respondent, Secretary of State Kerry, argues that "the Constitution assigns to the President both the sole power to make recognition decisions and the authority to conduct foreign relations based on those decisions."<sup>82</sup> The Secretary finds confirmation for this assertion in Article II of the Constitution, and also in Article I, which fails to provide an express role for Congress.<sup>83</sup> Moreover, he argues, practical considerations and historical practice confirm that this is so:

Occasional congressional attempts to unilaterally determine recognition policy were invariably rebuffed. Petitioner is unable to identify a single instance in our history in which Congress has asserted primacy in matters of recognition—either by rejecting a President's recognition decision or by making a decision the President was unwilling to make unilaterally.<sup>84</sup>

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<sup>81</sup> Brief for the Respondent at 57 fn. 14, *Zivotofsky v. Kerry*, No. 13-628 (U.S. September 22, 2014) (attributing the lack of adverse consequences to the fact that the mistakes could be explained as clerical errors), *available online at* [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/13-628\\_resp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-628_resp.authcheckdam.pdf).

<sup>82</sup> *Id.* at 9.

<sup>83</sup> *Id.* The Secretary concedes that "Congress may enact passport legislation in furtherance of its enumerated powers," so long as it does not "encroach on the President's use of passports as instruments of diplomacy." *Id.* at 11. Moreover, "because the Constitution provides no mechanism by which the Legislative and Executive Branches could share the recognition power, exclusive commitment of the recognition power to the Executive is necessary to ensure that the Nation speaks with one voice in foreign affairs." *Id.* at 13.

<sup>84</sup> *Id.* at 10-11.

A ruling enforcing Section 214(d) would:

force the Executive to convey to foreign sovereigns that—contrary to the President’s longstanding recognition position—the United States has concluded that Israel exercises sovereignty over Jerusalem ... result[ing] in significant uncertainty about the United States’ position and undermin[ing] the President’s ability to effectively exercise and implement his recognition power. It would also force the Executive to take an inconsistent position in conducting foreign relations on behalf of the United States, thereby undermining the President’s credibility and his conduct of sensitive diplomatic efforts.<sup>85</sup>

The Secretary dismisses each of the historical instances brought up by the petitioner as unavailing because Congress in each case acted consistently with the executive branch’s ultimate recognition decisions.<sup>86</sup> The Secretary notes Supreme Court dicta favoring exclusive executive recognition authority and distinguishes dicta running counter to that notion as involving inapposite matters.<sup>87</sup>

The Secretary denies that it is his position that Congress has no role in any matter touching on recognition.<sup>88</sup> Congress can, in his view, exercise its enumerated powers in “ways that may bear a relation to recognition, so long as such statutes do not impermissibly interfere with the Executive’s recognition power.”<sup>89</sup> For example, statutes that confer benefits to non-recognized entities (such as Taiwan under the Taiwan Relations Act) are permissible, according to the brief, so long as they are neutral as to official recognition and consistent with the executive’s existing treatment of the entity.<sup>90</sup>

## Senate Brief

The Senate submitted a brief as *amicus curiae*<sup>91</sup> to present its views that Section 214(d) is a “constitutional exercise of Congress’ power to regulate passports that does not implicate, let alone intrude upon, the Executive’s exercise of the recognition power.”<sup>92</sup> While the Senate explains that it views the recognition power as an authority Congress shares,<sup>93</sup> it urges the Court to reserve that question for another day. Instead, the Court should evaluate the Secretary’s refusal to implement Section 214(d) under the *Youngstown* category three standard, in which case the statute can be invalidated only by “disabling the Congress from acting upon the subject.”<sup>94</sup>

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<sup>85</sup> *Id.* at 12.

<sup>86</sup> *Id.* at 36.

<sup>87</sup> *Id.* at 41-42.

<sup>88</sup> *Id.* at 58.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 59.

<sup>91</sup> The brief is submitted by Senate Legal Counsel pursuant to S.Res. 504.

<sup>92</sup> Brief of the United States Senate as Amicus Curiae Supporting the Petitioner, *Zivotofsky v. Kerry*, No. 13-628 (U.S. July 22, 2014) (hereinafter “Senate Brief”), available online at [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/13-628\\_pet\\_amcu\\_us-senate.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-628_pet_amcu_us-senate.authcheckdam.pdf).

<sup>93</sup> *Id.* at 11 fn. 3.

<sup>94</sup> *Id.* at 10 (citing *Youngstown*, 343 U.S. at 637-38).



The Senate first presents evidence that Congress has practically since the nation's founding exercised its authority over foreign commerce and naturalization to legislate with respect to the issuance of passports.<sup>95</sup> Next, it argues:

The Court has consistently recognized Congress' plenary authority over passports and looked to Congress' legislative direction and delegation of authority to the Executive to delimit the scope of the proper exercise of the Executive's duties. In so doing, the Court has not relied on any inherent constitutional authority of the Executive, but has treated the Executive's administration of passport responsibilities as derived from and bound by Congress' legislative enactments, invalidating Executive action when not traceable to authority granted by Congress.<sup>96</sup>

The crux of the Senate's argument is that Section 214(d) does not interfere with the recognition power. Rather, according to the brief, Congress has "neither exercised the power of recognition, nor 'prevent[ed] the Executive Branch from accomplishing its constitutionally assigned functions' of recognition."<sup>97</sup> Section 214(d) does not provide official recognition of Israeli sovereignty over Jerusalem, the brief argues, contrary to what the lower court found.<sup>98</sup> The "place of birth" information on the passport functions as a means to identify the bearer, the brief maintains, as is demonstrated by the State Department's practice of giving applicants a choice as to how they identify their birthplace (in cases other than Jerusalem).<sup>99</sup> Moreover, the Senate asserts, Section 214(d) does not affect the legal consequences of the recognition of Israeli sovereignty or the status of Jerusalem.<sup>100</sup> Finally, the brief criticizes the appellate court decision for considering the possible foreign policy consequences of the measure and according complete deference to the executive branch on this score. This, the brief states, conflates the recognition power with foreign policy in general and improperly expands the President's power at the expense of Congress.

## House Members' Brief

Forty-two Members of the U.S. House of Representatives signed a brief as amici curiae in support of the petitioner.<sup>101</sup> They urge the Court to reverse the decision below on the ground that it "handed the President significant new foreign affairs powers at Congress's expense."<sup>102</sup> The amici Members recommend that the Court, in determining whether Section 214(d) "trench[es] on

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<sup>95</sup> *Id.* at 13. While the first comprehensive statute regulating the issuance of passports did not occur until 1856, Act of Aug. 18, 1856, ch. 127, §23, 11 Stat. 52, Congress had as early as 1803 made it a crime to issue a passport to an alien, Act of Feb. 28, 1803, ch. 9, §8, 2 Stat. 203, 205.

<sup>96</sup> Senate Brief, *supra* footnote 92, at 16 (citing *Kent v. Dulles*, 357 U.S. 116 (1958); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Haig v. Agee*, 453 U.S. 280 (1981)).

<sup>97</sup> *Id.* at 20 (citing *Nixon v. Adm'r of General Services*, 433 U.S. 425, 443 (1977)).

<sup>98</sup> *Id.* at 21.

<sup>99</sup> *Id.* The State Department permits passport applicants to list a locality of birth rather than the country if the applicant objects to listing the nation exercising sovereignty over the area. *See id.* at 24. The Secretary of State defends this practice as consistent with recognition policy because it does not express any opinion regarding the sovereignty of the nation at issue. Brief for the Respondent, *supra* footnote 81, at 50-51.

<sup>100</sup> Senate Brief, *supra* footnote 92, at 28-30.

<sup>101</sup> Brief of the United States Members of the United States House of Representatives as Amici Curiae Supporting the Petitioner, *Zivotofsky v. Kerry*, No. 13-628 (U.S. July 22, 2014) (hereinafter "House Members' Brief"), available online at [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/13-628\\_pet\\_amcu\\_ushr.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-628_pet_amcu_ushr.authcheckdam.pdf).

<sup>102</sup> *Id.* at 1.

the President's powers,"<sup>103</sup> should "determine both the scope of any exclusive Executive recognition power, and whether and to what degree, if any, the statute at issue prevents the President from exercising that power."<sup>104</sup> They urge the Court to construe the President's recognition power narrowly in order to conserve Congress's proper constitutional role in foreign affairs. In contrast to the Secretary's emphasis on the importance of the nation "speaking with one voice" in matters touching on foreign affairs,<sup>105</sup> the House Members assert that "[o]ur constitutional framework contemplates not only cooperation between the branches of government in this arena, but also a measure of tension."<sup>106</sup> The statute at issue does not infringe on presidential power because:

Section 214(d) in no way prevents or significantly impedes the President from exercising the recognition power. It does not direct the President to alter U.S. recognition policy towards Jerusalem or to consider Jerusalem to be within the borders of Israel as a matter of U.S. foreign policy. It merely instructs the Secretary of State to perform the ministerial act of recording "Israel" as the place of birth on the passport and consular report of birth abroad of an individual who avails himself of the self-identification opportunity presented by the statute.<sup>107</sup>

The House Members' brief describes a number of relatively recent instances where Congress has legislated in such a way as to "touch on, respond to, or register discord with the President's formal recognition policies."<sup>108</sup> For example, in the Taiwan Relations Act,<sup>109</sup> Congress granted Taiwan many of the rights associated with formal recognition, even after President Carter formally recognized the People's Republic of China.<sup>110</sup> More recently, Congress passed the United States-Hong Kong Policy Act of 1992,<sup>111</sup> which preserved the application of U.S. laws to Hong Kong after its transfer from the United Kingdom to China unless modified by law or executive order. The House Members also note congressional resolutions expressing the sense of the Congress with respect to the recognition of newly emerging foreign governments.<sup>112</sup>

Moreover, the brief notes that Congress frequently uses its appropriations power to condition foreign aid on matters closely linked to recognition.<sup>113</sup> The Members note the particular relevance

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<sup>103</sup> *Id.* at 2 (quoting *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012)).

<sup>104</sup> *Id.*

<sup>105</sup> See Brief for the Respondent, *supra* footnote 81, at 9 (arguing that the "principle that the Nation must speak with one voice in foreign affairs...applies with particular force to recognition decisions")(citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-320 (1936)); *id.* at 13, 24, 43.

<sup>106</sup> House Members' Brief, *supra* footnote 101, at 3.

<sup>107</sup> *Id.* at 5.

<sup>108</sup> *Id.* at 3, 8-13.

<sup>109</sup> P.L. 96-8, 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. §§ 3301-3316).

<sup>110</sup> House Members' Brief, *supra* footnote 101, at 8. The President adopted a policy of neutrality with respect to the question of Taiwan's status as subject to China's rule. For more on the importance of this legislation, see Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 TEMP. L. REV. 1, 44 (2013).

<sup>111</sup> P.L. 102-383, 106 Stat. 1448 (1992).

<sup>112</sup> House Members' Brief, *supra* footnote 101, at 9 & fn. 4.

<sup>113</sup> *Id.* at 9 (citing as an example the Consolidated Appropriations Act of 2014, P.L. 113-76 §7008, 128 Stat. 5 (prohibiting financial assistance to the government of any country whose "duly elected head of government is deposed by military coup d'état," unless "the President determines and certifies to the Committees on Appropriations that . . . a democratically elected government has taken office"))).

of funding limitations with respect to the Palestinian Authority, the West Bank, and Gaza.<sup>114</sup> Such funding restrictions, the brief states, are in force without regard to whether they comport with the President's recognition policy.<sup>115</sup> Congress has also enacted legislation that applies without regard for whether regions are recognized, while at the same time clarifying that such legislation does not constitute U.S. recognition of a particular government.<sup>116</sup> The Members' brief views the position of the executive branch as a threat to Congress's ability to appropriately exercise its constitutional powers,<sup>117</sup> and warns that the executive's position could threaten to undermine all of the foregoing examples and similar legislation.

The Members' brief concedes that the President is assigned foreign affairs responsibilities that are best held by an individual executive, who can react quickly and decisively to developments overseas.<sup>118</sup> It maintains that the President is the "instrument of foreign affairs" who is tasked with "carrying out foreign policy."<sup>119</sup> However, the amici argue that Congress is well-situated to play a robust role in the *determination* of foreign policy.<sup>120</sup> They criticize the lower court's decision as an "abdication" of its "responsibility to decide the constitutional question presented here" by deferring to the executive's view of the scope of the recognition power.<sup>121</sup>

## Conclusion

Whether Section 214(d) impinges on the President's recognition power depends upon the Supreme Court's view of the "textual, structural, and historic evidence" of the nature of the President's recognition power and Congress's passport power—as well as the nature of the statute itself.<sup>122</sup> The outcome, however, may depend on or possibly influence the nature of the constitutional allocation of foreign affairs powers more generally. The threshold question seems to be whether Section 214(d), if enforced, has an effect on U.S. policy recognizing the status of Jerusalem. If it is found to have no such effect, then the question of which branch holds the recognition power may be avoided. The appellate court gave deference to the executive branch to determine that the provision would have adverse consequences with respect to its Jerusalem policy. It declined to consider the position advanced by Members of Congress in an amici curiae brief advancing contrary theories, but took into consideration the sparse legislative history of Section 214 suggesting that a policy change with respect to Jerusalem's status was the goal.<sup>123</sup> The Supreme Court's willingness to accord some weight to the views of the Senate and some Members of the House may affect the outcome.

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<sup>114</sup> *Id.* at 10 (citing P.L. 113-76).

<sup>115</sup> *Id.* at 11.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 14.

<sup>118</sup> *Id.* at 16.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 17.

<sup>121</sup> *Id.* at 18-19.

<sup>122</sup> *Zivotofsky*, 132 S. Ct. at 1430.

<sup>123</sup> The D.C. Circuit gave weight to a description in the conference report for the FY2003 FRAA that stated that Section 214 "contain[ed] four provisions related to the recognition of Jerusalem as Israel's capital." *Id.* at 218 (citing H.Rept. 107-671 at 123). It also cited various Members' remarks explaining that the purpose of Section 214(d) "was to affect United States policy toward Jerusalem and Israel." *Id.*

The parties and their supporters marshal considerable evidence supporting their positions with respect to whether the recognition power is exclusively the executive's or shared with Congress, but they apply different standards to interpret the evidence. The Secretary of State, like the court below, emphasizes the numbers involved. If what matters is that the recognition power has most often been exercised by the executive branch without congressional participation, or that Supreme Court dicta more frequently suggest an exclusive role for the executive than they do a shared role for the political branches, then it seems likely the State Department position will prevail. Additionally, if a premium is placed on the principle of cohesion in foreign policy—that the nation “speaks with one voice”<sup>124</sup>—at the expense of checks and balances between the branches, then it seems likely the statute will fall.

In assessing historical evidence put forth by the petitioner to demonstrate that Congress has played a role in recognition matters, the Secretary and the D.C. Circuit seem to set the bar high in order for congressional action to count as significant; both demand evidence that Congress has asserted primacy in the actual formal recognition of a foreign government or has exercised an exclusive authority to regulate passports. Under this standard, congressional activity touching on the recognition of foreign nations or granting (or denying)<sup>125</sup> the benefits associated with recognized sovereignty is significant only insofar as it succeeds in fully displacing executive branch decisions. The absence of such evidence is apparently deemed to demonstrate that congressional action running counter to presidential policy is not just subject to veto but may be disregarded as unconstitutional. It seems odd that the constitutionality of a statute could turn on consistency with existing policy, such that a change in executive branch policy could render a statute unconstitutional or constitutional, as the case may be.

If, on the other hand, a *Youngstown* framework is adopted not only to review the statute at issue but also the historical evidence proffered, then it appears less likely that Congress will be deemed to be wholly disabled from enacting laws that touch on the recognition power. The court below seems to have reviewed the validity of congressional participation in historical recognition decisions in terms of whether its actions comported with or sought to displace executive branch policy. It also regarded *Youngstown* category two cases—in which Congress acquiesced to an

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<sup>124</sup> See Brief for the Respondent, *supra* footnote 81, at 9 (emphasizing the “principle that the Nation must speak with one voice” in foreign affairs)(citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-320 (1936); *id.* at 13, 24, 43. It may be worth bearing in mind that *Curtiss-Wright* did not involve an interbranch dispute, but rather tested the extent to which Congress can delegate foreign affairs matters to executive discretion. For an argument that *Curtiss-Wright* should be irrelevant to this case, see Brief Amicus Curiae of Louis Fisher Supporting the Petitioner, *Zivotofsky v. Kerry*, No. 13-628 (U.S. July 17, 2014), *available online at* [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/13-628\\_pet\\_amcu\\_fisher.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-628_pet_amcu_fisher.authcheckdam.pdf).

<sup>125</sup> One prominent example of statutory regulation of benefits associated with sovereignty in U.S. courts might be the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.*, This statute may be another example where Congress codified executive branch policy, yet the two branches have sometimes clashed over matters involving the sovereign immunity of states designated by the State Department as State Sponsors of Terrorism, who generally are recognized as sovereign but with whom the United States does not maintain diplomatic relations. For a historical overview, see CRS Report RL31258, *Suits Against Terrorist States by Victims of Terrorism*, by Jennifer K. Elsea. A dispute over Iraq's sovereign immunity with respect to terrorism lawsuits led to the veto of a bill authorizing funds for the department of defense for FY2008, H.R. 1585 (110<sup>th</sup> Cong.). In response, Congress passed a new bill that included waiver authority with respect to Iraqi sovereign immunity, P.L. 110-181 §1083(d). See CRS Report RL31258, *Suits Against Terrorist States by Victims of Terrorism*, by Jennifer K. Elsea. President George W. Bush cited foreign policy concerns in his veto message, but did not claim the measure was unconstitutional. See Notification of the Veto of H.R. 1585, the National Defense Authorization Act for Fiscal Year 2008, H.R. Doc. No. 110-88, *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_documents&docid=f:hd088.110](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_documents&docid=f:hd088.110).

executive action but some controversy arose because of discordant legislating on the part of a state—as if they were functionally the same as *Youngstown* category three cases in which the executive branch prevailed in the face of conflicting congressional action. If the Supreme Court treats Congress’s foreign affairs role with respect to recognition as distinguishable from that of a state, then Section 214(d)’s chances of survival become a closer call.

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