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Zivotofsky v. Kerry: The Jerusalem Passport Case and Its Potential Implications for Congress's Foreign Affairs Powers

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Summary

The Supreme Court in its last term by a vote of 6-3 invalidated a statute passed by Congress touching on the status of Jerusalem, affirming the U.S. Court of Appeals for the D.C. Circuit decision in *Zivotofsky v. Secretary of State* that the President's power to recognize foreign sovereigns is exclusive and trumps Congress's authority to regulate passports. The Court's decision in *Zivotofsky v. Kerry* (*Zivotofsky II)* represents the first time the Court has struck down a congressionally enacted law on the basis of a separation-of-powers infringement involving a matter of foreign affairs. At the same time, the Court rejected the executive branch assertion that it has exclusive authority to conduct international diplomacy, while endorsing Congress's ample authority to influence the nation's foreign affairs. The implications the decision will have on Congress's foreign affairs authority will likely depend on its interpretation by lower courts, as well as the two political branches.

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 directed the State Department to give 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 next summarizes the appellate court's opinion finding the passport measure at issue unconstitutional. Turning to the Supreme Court decision, it presents brief synopses of the petitioner's argument, 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. The report then summarizes the Supreme Court decision, including concurrences and dissents. Finally, the report concludes by suggesting possible implications of the decision with respect to Congress's authority to influence foreign affairs. While the decision recognizes Congress's ample authority to legislate in matters touching on foreign affairs so long as its actions do not infringe the narrowly defined executive power to recognize foreign states, it does not provide a clear blueprint for distinguishing legislation that impermissibly forces the executive branch to contradict an earlier recognition decision from laws that permissibly interfere with sovereign privileges accorded to a foreign state once it is recognized; nor does it provide a thorough explanation for why this distinction is of constitutional significance. Moreover, the Court's analysis in determining that Congress has no share in the recognition power could arguably provide an advantage to the executive branch in future separation-of-powers disputes involving foreign affairs, should one arise.

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Background

The Supreme Court in its last term by a vote of 6-3 invalidated a statute passed by Congress touching on the status of Jerusalem,[1] affirming the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) decision in *Zivotofsky v. Secretary of State*[2] that the President's power to recognize foreign sovereigns is exclusive and trumps Congress's authority to regulate passports. The Court's decision in *Zivotofsky v. Kerry* (*Zivotofsky II)* represents the first time the Court has struck down a congressionally enacted law on the basis of a separation-of-powers infringement involving a matter of foreign affairs. At the same time, the Court rejected the executive branch assertion that it has exclusive authority to conduct international diplomacy, while endorsing Congress's ample authority to influence the nation's foreign affairs. The implications the decision will have on Congress's foreign affairs authority will likely depend on its interpretation by lower courts, as well as the two political branches.

Successive U.S. Administrations have maintained that the status of Jerusalem is a matter to be resolved between Israel and the Palestinians.[3] Congress has consistently urged the President to recognize Jerusalem as the capital of Israel. In 2002 Congress passed a measure that directed the State Department to give 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."[4]

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[5] and then on the basis of the political question doctrine,[6] 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.[7]

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 next summarizes the appellate court's opinion finding the passport measure at issue unconstitutional. It presents brief

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

[2] 725 F.3d 197 (D.C. Cir. 2013), *cert. granted sub nom.* Zivotofsky v. Kerry, 134 S. Ct. 1873 (2014).

[3] For more information about foreign policy with respect to Jerusalem, see CRS Report RL33476, *Israel: Background and U.S. Relations*, by Jim Zanotti.

[4] 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").

[5] 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).

[6] 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 (*Zivotofsky I*), 132 S. Ct. 1421 (2012).

[7] *Zivotofsky I*, 132 S. Ct. at 1430. For a discussion of *Zivotofsky I* and its possible implications with respect to the political question doctrine, see CRS Report R43834, *The Political Question Doctrine: Justiciability and the Separation of Powers*, by Jared P. Cole.

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. The report summarizes the Supreme Court decision, including concurrences and dissents. Finally, the report concludes by suggesting some factors that may affect implications of the decision with respect to Congress's authority to influence foreign affairs.

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).[8] 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.[9] 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 FY2003 FRAA as ultimately enacted.[10] 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.[11] 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.[12]

The Jerusalem Embassy Act

This was not Congress's first effort to encourage a change in U.S. policy with respect to Jerusalem.[13] The first subsection of Section 214 explicitly referenced a previously enacted provision from the Jerusalem Embassy Act of 1995,[14] 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

[8] Foreign Relations Authorization Act, Fiscal Year 2003, P.L. 107-228, 116 Stat. 1350 (2002).

[9] H.R. 1646 (as introduced in the House of Representatives, 107th Cong.) §235(d).

[10] P.L. 107-228 §214(d). The conference report describes Section 214 as containing "four provisions related to the recognition of Jerusalem as Israel's capital." H.Rept. 107-671.

[11] *See* FY2003 FRAA Signing Statement, *supra* footnote 4.

[12] *Id*. The term "purported direction" is probably a reference to Section 214(d) rather than a reference to the section as a whole.

[13] See CRS Report RL33476, *Israel: Background and U.S. Relations*, by Jim Zanotti, *supra* footnote 3, for a history of such measures.

[14] Jerusalem Embassy Act of 1995, P.L. 104-45 (1995).

building acquisition and maintenance until a new embassy opens in Jerusalem.[15] The statute also includes a provision for the President to waive the spending limitations,[16] which waiver Presidents Clinton, Bush, and Obama have consistently exercised.[17]

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 (105th Cong.).[18] 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."[19] 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 (105th Cong.). Representative Gilman described the need for the passport provision as "a simple case of fairness, and of righting a wrong."[20] No further action was taken on the bill, but the 105th Congress included the language as part of the Foreign Affairs Reform and Restructuring Act of 1998.[21] President Clinton vetoed that bill for other reasons.[22]

The House Committee on International Relations questioned Clinton Administration officials about the Jerusalem passport policy during hearings held in March 1998.[23] 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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[15] *Id*. §3.

[16] *Id*. §7.

[17] *See* CRS Report RL33476, *Israel: Background and U.S. Relations*, by Jim Zanotti, *supra* footnote 3.

[18] H.R. 1486 §1710 (105th 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 was listed as Israel's capital.

[19] H.Rept. 105-94.

[20] 143 CONG. REC. 25212 (November 7, 1997) (extension of remarks by Representative Gilman).

[21] H.R. 1757 (105th Cong.) §1812. *See also* H.Rept. 105-432.

[22] *See* Veto Message for H.R. 1757, 34 WEEKLY COMP. PRES. DOC. 2088 (October 21, 1998) (objecting to restrictions on international family planning programs).

[23] *Developments in the Middle East: Hearing before the Committee on International Relations, House of Representatives*, 105th 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.[24]

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,[25] but the section was eliminated in conference, H.R. 4276 (105th Cong.).

The Jerusalem passport measure was included in a number of bills during the 106th Congress,[26] and passed the Senate three times,[27] but was not enacted by that Congress, apparently due to objections from the Administration.[28] 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.[29] President Clinton vetoed the bill, citing the Jerusalem provisions among other objections as the reason.[30] 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.[31]

Reenactment of the Passport Provision

After its initial enactment in the 107th Congress, the Jerusalem passport provision was enacted again in a number of spending bills. The 108th 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.[32] President George W. Bush objected to a number of provisions as unconstitutionally impeding his ability to conduct foreign affairs, but did not single out the Jerusalem passport

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[24] *Id*.

[25] S. 2260 (105th Cong.). The measure was added as a floor amendment, S.Amdt. 3278.

[26] *See* H.R. 4690 (reported in Senate, 106th Cong.), H.R. 2768 (introduced in the House, 106th Cong.), H.R. 2785 (introduced in the House, 106th Cong.), H.R. 2529 (introduced in the House, 106th Cong.), H.R. 2515, (introduced in the House, 106th Cong.).

[27] S. 886 (engrossed in Senate, 106th Cong.), H.R. 2670 (engrossed in Senate, 106th Cong.), H.R. 2415 (engrossed in Senate, 106th Cong.).

[28] *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).

[29] H.R. 2670 (enrolled bill, 106th 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).

[30] 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).

[31] *Id*. at 2153.

[32] 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."

provision among them.[33] The provision was also included in the Consolidated Appropriations Act for 2004.[34] President Bush listed the section among those deemed objectionable for purporting to "direct or burden the Executive's conduct of foreign relations."[35] Later that year, the identical provision was included in the Consolidated Appropriations Act for 2005 as Section 406 (Div. B).[36] 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.... "[37] One effort to prohibit expenditures "in contravention of the provisions of Section 214(d) of the [FY2003 FRAA]" was adopted by the House,[38] but was not included in the final consolidated appropriations bill.

The House of Representatives of the 109th Congress passed a measure to codify the Jerusalem passport provision as part of the statute authorizing the Secretary of State to issue passports.[39] 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."[40] The Senate did not take up the bill.

The 109th Congress later enacted the Jerusalem passport provision as Section 405 of the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006.[41] This time, President Bush cited his authority to recognize foreign states among the reasons for objecting to that provision.[42] The 110th Congress passed the identical provision as Section 107 (Div. J) of the Consolidated Appropriations Act, 2008.[43] In a brief signing statement, the President wrote:

> [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

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[33] Statement on Signing the Consolidated Appropriations Resolution, 2003, 39 WEEKLY COMP. PRES. DOC. 227 (February 20, 2003).

[34] 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."

[35] Statement on Signing the Consolidated Appropriations Act, 2004, 40 WEEKLY COMP. PRES. DOC. 137 (January 23, 2004).

[36] 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.

[37] Statement on Signing the Consolidated Appropriations Act, 2005, 40 WEEKLY COMP. PRES. DOC. 2924 (December 8, 2004).

[38] 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).

[39] Foreign Relations Authorization Act for FY2006 and FY2007, H.R. 2601 §209 (as engrossed by the House, 109th Cong.).

[40] U.S. CONST., Art. I, §8, cl. 18.

[41] 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.

[42] Statement on Signing the Science, State, Justice, Commerce, and Related Agencies Appropriations, 41 WEEKLY COMP. PRES. DOC. 1764 (November 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 ... ").

[43] P.L. 110-161, 121 Stat. 2287. The provision appears to have been added as an amendment by the Senate.

> 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.[44]

Despite continued interest in moving the embassy to Jerusalem and recognizing the City as Israel's capital, Congresses subsequent to the 110th Congress do not appear to have expressly considered the Jerusalem passport measure. Some bills introduced during that time appeared to presume that the original provision from the FY2003 FRAA continued in force.[45] 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.[46]

Zivotofsky v. Secretary of State (D.C. Circuit)

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,[47] 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 down 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 was widely thought to be derived from the President's Article II obligation to "receive Ambassadors and other public Ministers.... "[48] The court and both parties agreed that the case falls into the third *Youngstown* category,[49] meaning the President's refusal 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.

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[44] Statement on Signing the Consolidated Appropriations Act, 2008, 43 WEEKLY COMP. PRES. DOC.1638 (December 26, 2007).

[45] *See* H.Con.Res. 48. (113th 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 (111th Cong.); H.Con.Res. 5 (112th Cong.).

[46] 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. None of the courts that considered the measure questioned its permanence, which would not have mattered to the case at hand but might have mitigated any foreign policy repercussions had the statute been upheld.

[47] *Zivotofsky I*; for a description of that decision, see CRS Report R43834, *The Political Question Doctrine: Justiciability and the Separation of Powers*, by Jared P. Cole.

[48] *See, e.g.,* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §204, cmt. a.

[49] 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 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.

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 appellate court did not accept the view that the constitutional text is dispositive in resolving the origin of the power to recognize foreign nations.[50] 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. The court also found support for its holding in Supreme Court dicta according the President vast powers over the nation's foreign relations,[51] including the prerogative to recognize foreign governments,[52] albeit never in a case like this one in which a direct congressional challenge to that power was involved.

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*,[53] 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.... [54]

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.[55]

As to the question of 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.[56] The court declined to

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[50] *Zivotofsky*, 725 F.3d at 206.

[51] *Id*. at 211.

[52] *Id*. (citing Williams v. Suffolk Ins. Co., 38 U.S. 415, 420 (1839) ("[If] 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.")).

[53] 315 U.S. 203 (1942).

[54] *Zivotofsky*,725 F.3d at 213 (quoting *Pink*, 315 U.S. at 213) (emphases added by D.C. Cir.).

[55] *Id*. at 216.

[56] *Zivotofsky*, 725 F.3d at 218-19.

consider the views of Members of Congress who submitted a brief,[57] 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.

Zivotofsky v. Kerry

The case then returned to the Supreme Court under the name *Zivotofsky v. Kerry*. The question presented was:

> Whether a federal statute that directs the Secretary of State, on request, to record the birthplace of an American citizen born in Jerusalem as born in "Israel" on a Consular Report of Birth Abroad and on a United States passport is unconstitutional on the ground that the statute "impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him."

The Arguments before the Supreme Court

Numerous amicus briefs were 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.[58]

Petitioner's Brief

The petitioner disputed the lower court's finding that the recognition power belongs exclusively to the President and argued that Section 214(d) is well within Congress's power to regulate passports.[59] Moreover, the petitioner downplayed the possible foreign policy ramifications of the provision if it were enforced and dismissed 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 argued that the State Department's policy regarding passports of American citizens born in Jerusalem did 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 noted the absence of constitutional language to that effect and cited early scholarly treatment of the subject that supports a possible congressional role. The petitioner also described post-ratification historical incidents that he believed 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 argued 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

[57] *Id*. at 219 & fn. 19.

[58] The briefs of the parties and of amici curiae can be found at http://www.scotusblog.com/case-files/cases/zivotofsky-v-kerry/.

[59] 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.

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 listed 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.[60]
- 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 government of France,"[61] 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.[62]
- President Andrew Jackson in 1837 acquiesced to resolutions passed by the House and Senate calling for the recognition of the Republic of Texas.[63]
- 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).[64]
- In 1861 President Abraham Lincoln, in his first annual message to Congress, requested Congress's approval for the recognition of Haiti and Liberia.[65] Congress responded by enacting legislation to authorize the President to appoint diplomatic representatives to the "Republics of Hayti and Liberia."[66]
- 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

[60] *Id*. at 38 (citing the Act of February 27, 1800, ch. 10, §7, 2 Stat. 7, 10).

[61] *Id*. at 39-40 (citing the Act of February 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)).

[62] *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 emphasized the interbranch cooperation at the suggestion of the President.

[63] Brief for the Petitioner, *supra* footnote 59, at 45-48.

[64] *Id*. at 49-50.

[65] *Id*. at 50.

[66] *Id*.; Act of June 5, 1862, 12 Stat. 421.

constitutional authority to establish policy with respect to the recognition of foreign governments.[67] 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."[68]

The petitioner interpreted this post-ratification history as establishing that "Congress engaged in legislative recognition of foreign governments and participated in the recognition process."[69]

The petitioner's brief next took issue with the appellate court's interpretation of Supreme Court dicta as controlling. The brief emphasized 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. The petitioner also criticized the appellate opinion for minimizing the importance of dicta that can be interpreted to support his position.

The petitioner's brief argued 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 was at its "lowest ebb." The Jerusalem passport policy, according to the petitioner, could not withstand such strict scrutiny because it was based on a mistaken fear that Palestinians would 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 suggested, is overblown because the provision did not require that Israel be listed as the place of birth for citizens born in Jerusalem, it merely provided 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 would have no way of knowing where in Israel the passport bearer was born and thus would be unable to discern any official statement with respect to the status of Jerusalem. (The petitioner also noted 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.)[70]

Secretary of State's Brief

The respondent, Secretary of State Kerry, argued 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."[71] The Secretary found confirmation for this assertion in Article II of

[67] Brief for the Petitioner, *supra* footnote 59, at 52-54

[68] *Id.* at 55 (citing the Act of April 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 emphasized Congress's repudiation of Spanish sovereignty over the island.

[69] Brief for the Petitioner, *supra* footnote 59, at 56.

[70] 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.

[71] *Id.* at 9.

the Constitution, and also in Article I, which fails to provide an express role for Congress.[72] Moreover, he argued, 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.[73]

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.[74]

The Secretary dismissed 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.[75] The Secretary noted Supreme Court dicta favoring exclusive executive recognition authority and distinguished dicta running counter to that notion as involving inapposite matters.[76]

The Secretary denied that it is his position that Congress has no role in any matter touching on recognition.[77] 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."[78] For example, statutes that confer benefits to non-recognized entities (such as Taiwan under the Taiwan Relations Act)[79] 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.[80]

Senate Brief

The Senate submitted a brief as amicus curiae[81] to present its views that Section 214(d) was 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."[82] While the Senate explained

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[72] *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.

[73] *Id*. at 10-11.

[74] *Id*. at 12.

[75] *Id*. at 36.

[76] *Id*. at 41-42.

[77] *Id*. at 58.

[78] *Id*.

[79] P.L. 96-8, 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. §§3301–3316).

[80] Brief for the Respondent at 59.

[81] The brief was submitted by Senate Legal Counsel pursuant to S.Res. 504.

[82] Brief of the United States Senate as Amicus Curiae Supporting the Petitioner, Zivotofsky v. Kerry, No. 13-628 (U.S.

that it views the recognition power as an authority Congress shares,[83] it urged 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 could be invalidated only by "disabling the Congress from acting upon the subject."[84]

The Senate first presented 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.[85] Next, it argued:

> 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.[86]

The crux of the Senate's argument was that Section 214(d) did not interfere with the recognition power. Rather, according to the brief, Congress had "neither exercised the power of recognition, nor 'prevent[ed] the Executive Branch from accomplishing its constitutionally assigned functions' of recognition."[87] Section 214(d) did not provide official recognition of Israeli sovereignty over Jerusalem, the brief argued, contrary to what the lower court found.[88] The "place of birth" information on the passport functions as a means to identify the bearer, the brief maintained, 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).[89] Moreover, the Senate asserted, Section 214(d) would not affect the legal consequences of the recognition of Israeli sovereignty or the status of Jerusalem.[90] Finally, the brief criticized 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 stated, conflates the recognition power with foreign policy in general and improperly expands the President's power at the expense of Congress.

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.

[83] *Id*. at 11 fn. 3.

[84] *Id*. at 10 (citing *Youngstown*, 343 U.S. at 637-38).

[85] *Id*. at 13. While the first comprehensive statute regulating the issuance of passports did not occur until 1856, Act of August 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 February 28, 1803, ch. 9, §8, 2 Stat. 203, 205.

[86] Senate Brief, *supra* footnote 82, 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)).

[87] *Id* at 20 (citing Nixon v. Adm'r of General Services, 433 U.S. 425, 443 (1977)).

[88] *Id*. at 21.

[89] *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 defended 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 70, at 50-51.

[90] Senate Brief, *supra* footnote 82, at 28-30.

House Members' Brief

Forty-two Members of the U.S. House of Representatives signed a brief as amici curiae in support of the petitioner.[91] They urged the Court to reverse the decision below on the ground that it "handed the President significant new foreign affairs powers at Congress's expense."[92] The amici Members recommended that the Court, in determining whether Section 214(d) "trench[es] on the President's powers,"[93] 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."[94] They urged 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,[95] the House Members asserted that "[o]ur constitutional framework contemplates not only cooperation between the branches of government in this arena, but also a measure of tension."[96] The statute at issue did 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.[97]

The House Members' brief described 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."[98] For example, in the Taiwan Relations Act,[99] Congress granted Taiwan many of the rights associated with formal recognition, even after President Carter formally recognized the People's Republic of China.[100] More recently, Congress passed the United States-Hong Kong Policy Act of 1992,[101] 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

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[91] Brief for 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.

[92] *Id*. at 1.

[93] *Id*. at 2 (quoting Zivotofsky v. Clinton, 132 S. Ct. 1421, 1428 (2012)).

[94] *Id*.

[95] *See* Brief for the Respondent, *supra* footnote 70, 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.

[96] House Members' Brief, *supra* footnote 91, at 3.

[97] *Id*. at 5.

[98] *Id*. at 3, 8-13.

[99] P.L. 96-8, 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. §§3301-3316).

[100] House Members' Brief, *supra* footnote 91, 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).

[101] P.L. 102-383, 106 Stat. 1448 (1992).

executive order. The House Members also noted congressional resolutions expressing the sense of the Congress with respect to the recognition of newly emerging foreign governments.[102]

Moreover, the brief noted that Congress frequently uses its appropriations power to condition foreign aid on matters closely linked to recognition.[103] The Members emphasized the particular relevance of funding limitations with respect to the Palestinian Authority, the West Bank, and Gaza.[104] Such funding restrictions, the brief stated, are in force without regard to whether they comport with the President's recognition policy.[105] 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.[106] The Members' brief viewed the position of the executive branch as a threat to Congress's ability to appropriately exercise its constitutional powers,[107] and warned that the executive's position could threaten to undermine all of the foregoing examples and similar legislation.

The Members' brief conceded 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.[108] It maintained that the President is the "instrument of foreign affairs" who is tasked with "carrying out foreign policy."[109] However, the amici argued that Congress is well situated to play a robust role in the *determination* of foreign policy.[110] They criticized 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.[111]

Supreme Court Decision

Majority Opinion

Justice Kennedy, writing for a five-Justice majority, began by noting the complex and delicate questions posed by the status of Jerusalem, but stated that these are left to Congress and the President, not the Court, to sort out. [112] He reiterated the Court's reliance on the *Youngstown* framework to consider claims of presidential power, explaining that:

> [W]hen "the President takes measures incompatible with the expressed or implied will of Congress ... he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." To succeed in this third category, the President's asserted power must be both "exclusive" and "conclusive" on the issue."

[102] House Members' Brief, *supra* footnote 91, at 9 & fn. 4.

[103] *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")).

[104] *Id*. at 10 (citing P.L. 113-76).

[105] *Id*. at 11.

[106] *Id*.

[107] *Id*. at 14.

[108] *Id*. at 16.

[109] *Id*.

[110] *Id*. at 17.

[111] *Id*. at 18-19.

[112] Zivotofsky *ex rel*. Zivotofsky v. Kerry (*Zivotofsky II*), 135 S. Ct. 2076, 2081 (2015).

> ...
>
> Because the President's refusal to implement § 214(d) falls into Justice Jackson's third category, his claim must be "scrutinized with caution," and he may rely solely on powers the Constitution grants to him alone.[113]

Justice Kennedy analyzed the dispute as boiling down to two questions: (1) whether the President has the exclusive power to grant formal recognition to a foreign sovereign; and (2) if he does, whether Congress can command the executive branch to issue a formal statement that contradicts the earlier recognition.[114]

Exclusivity of the Recognition Power

Answering the first question required an examination of "the Constitution's text and structure, as well as precedent and history bearing on the question."[115] After describing the meaning of recognition under international law and the legal consequences that flow from it, the majority noted that the Constitution does not employ the term "recognition." However, it adduced evidence suggesting that receiving an ambassador was considered at the time of the founding to be tantamount to recognizing the sovereignty of the sending state. Thus, from the President's constitutional duty to receive ambassadors, in combination with the Article II powers to make treaties and appoint ambassadors (albeit with Senate participation), the President's recognition power can be inferred.[116] The majority explained that Congress cannot without presidential action conclude or ratify a treaty, nor can it send an ambassador without presidential involvement. [117] In contrast, the Court explained, the President has the means to engage in diplomacy and effect recognition on his own initiative.[118] Consequently, the text and structure of the Constitution suggest that the recognition power resides in the President.

The Court next addressed the question of whether the recognition power is exclusive in the President. Functional considerations, namely the notion that recognition is "a topic on which the Nation must speak ... with one voice," cemented the matter in favor of executive exclusivity, with the Court emphasizing that "that voice is the President's."[119]

> The various ways in which the President may unilaterally effect recognition—and the lack of any similar power vested in Congress—suggest that it is [an exclusively executive branch power]. So, too, do functional considerations. Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not. Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received;

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[113] *Id*. at 2084 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring)).

[114] *Id*. at 2081.

[115] *Id*.

[116] *Id*. at 2085 ("It is a logical and proper inference, then, that a Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations."); *Id*. ("The inference that the President exercises the recognition power is further supported by his additional Article II powers.").

[117] *Id*. at 2086 ("Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation.").

[118] *Id*. at 2085 ("As a matter of constitutional structure, these additional powers give the President control over recognition decisions. At international law, recognition may be effected by different means, but each means is dependent upon Presidential power. In addition to receiving an ambassador, recognition may occur on "the conclusion of a bilateral treaty," or the "formal initiation of diplomatic relations," including the dispatch of an ambassador.").

[119] *Id*. at 2086.

> whether their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights. These assurances cannot be equivocal.[120]

Before turning to precedent, the Court paused to take note of Congress's foreign affairs powers under the Constitution[121] and explain that many foreign policy decisions even with regard to recognized nations may require congressional action:

> Although the President alone effects the formal act of recognition, Congress' powers, and its central role in making laws, give it substantial authority regarding many of the policy determinations that precede and follow the act of recognition itself. If Congress disagrees with the President's recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress.[122]

Turning to judicial precedent, the Court described how presidents since the founding have exercised the unilateral power to recognize new foreign states, which the Court has consistently endorsed (although typically in disputes between the executive branch and the states rather than with Congress). Judicial language in other cases suggesting a role for Congress in making recognition decisions did not sway the Court, inasmuch as such statements have appeared in the context of affirming the lack of a judicial role in recognition matters,[123] and are in any event consistent with Congress performing a supporting role.[124] While acknowledging that none of the cases cited addressed or resolved the type of inter-branch conflict presented, the Court felt that "a

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[120] The Court explained:

> Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, "[d]ecision, activity, secrecy, and dispatch." The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition. He is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law. These qualities explain why the Framers listed the traditional avenues of recognition—receiving ambassadors, making treaties, and sending ambassadors—as among the President's Article II powers.

Id. (internal citations omitted).

[121] Justice Kennedy wrote:

> Congress may "regulate Commerce with foreign Nations," "establish an uniform Rule of Naturalization," "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," "declare War," "grant Letters of Marque and Reprisal," and "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., Art. I, § 8. In addition, the President cannot make a treaty or appoint an ambassador without the approval of the Senate. Art. II, § 2, cl. 2. The President, furthermore, could not build an American Embassy abroad without congressional appropriation of the necessary funds. Art. I, § 8, cl. 1. Under basic separation-of-powers principles, it is for the Congress to enact the laws, including "all Laws which shall be necessary and proper for carrying into Execution" the powers of the Federal Government. § 8, cl. 18.

Id. at 2087.

[122] *Id*.

[123] *Id*. at 2090 (citing Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918); United States v. Palmer, 3 Wheat. 610, 643 (1818)).

[124] *Id*. ("This is consistent with the fact that Congress, in the ordinary course, does support the President's recognition policy, for instance by confirming an ambassador to the recognized foreign government. Those cases do not cast doubt on the view that the Executive Branch determines whether the United States will recognize foreign states and governments and their territorial bounds.").

fair reading" of them demonstrates that "the President's role in the recognition process is both central and exclusive."[125]

While emphasizing the importance of national unity ("speaking with one voice") in recognizing foreign sovereigns, the Court rebuffed the Secretary of State's exhortation to define executive foreign affairs powers in "even broader terms" to encompass "'exclusive authority to conduct diplomatic relations' along with 'the bulk of foreign-affairs powers'"[126] The Court thus made an effort to cabin the reach of its 1936 *Curtiss-Wright* decision,[127] which is often invoked in support of vast presidential foreign affairs powers (and was heavily relied on by the Secretary in this case), essentially describing that case as a *Youngstown* category one case in which the Court upheld a congressional delegation of power (rather than striking a statute as congressional aggrandizement), and acknowledging its broad language seemingly conferring on the President exclusive power as the "sole organ of the nation in its external relations" to be dicta.[128] The majority emphasized that the "Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue."[129]

Turning to accepted understandings and historical practice, the Court found history not one-sided but sufficiently weighted toward the President to support presidential exclusivity over recognitions of foreign powers.[130] That "some Presidents have chosen to cooperate with Congress" does not, according to the Court, establish that "Congress itself has exercised the recognition power,"[131] which would apparently be the showing required to establish recognition as a shared power. The Court then recounted a history largely characterized by congressional acquiescence to the President vis-à-vis recognition, and concluded that "Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency."[132]

Constitutionality of §214(d)

That left the matter of whether the contested statute in fact infringes on the "Executive's consistent decision to withhold recognition with respect to Jerusalem." The Court agreed with the Secretary that it does:

> If the power over recognition is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent's statements.... [I]f Congress could alter the President's statements on matters of recognition or force him to contradict them, Congress in effect would exercise the recognition power.[133]

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[125] *Zivotofsky II* at 2088-89 (citing such cases as National City Bank of N.Y. v. Republic of China, 348 U.S. 356 (1955); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); Guaranty Trust Co. v. United States, 304 U.S. 126 (1938), Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Williams v. Suffolk Ins. Co., 13 Pet. 415 (1839)).

[126] *Id*. at 2089 (citing the Government Brief at 18, 16).

[127] United States v. Curtiss–Wright Export Corp., 299 U.S. 304 (1936) (upholding executive implementation of sanctions authority regarding arm sales conferred by statute).

[128] *Zivotofsky II* at 2089-90 (citing *Curtiss-Wright* at 316).

[129] *Id.* at 2090.

[130] *Id*. at 2091.

[131] *Id*.

[132] *Id*. at 2094.

[133] *Id*. at 2094-95.

The Court recognized that Congress has authority to regulate the content of U.S. passports, but stated that such authority may not be exercised in such a way as to aggrandize Congress's power at the expense of the executive branch. In so holding, the Court emphasized that it does not question the substantial powers of Congress over foreign affairs in general or passports in particular.[134] And although it acknowledged that the annotation required by Section 214(d) would not itself constitute a formal act of recognition, the majority deemed the requirement unacceptable as a "mandate that the Executive contradict his prior recognition determination in an official document."[135] The majority found the unconstitutionality of the measure underscored by the "undoubted fact that the purpose of the statute was to infringe on the recognition power."[136]

Concurrences

Justice Breyer wrote a concurring opinion, joining the majority, but reiterating his view that the case presents a political question and ought not have been decided at all.[137]

Justice Thomas concurred in the judgment holding the statute unlawful as to passports, but dissented in part as to its effect on consular reports of birth[138] (the majority found the Zivotofskys had waived their request with respect to that document)[139]. The treatment of such reports, he argued, is authorized under Congress's power to regulate naturalization and to make rules necessary and proper to the exercise of federal power, and does not implicate the President's foreign affairs powers.[140]

In contrast, under Justice Thomas's view, Congress lacks a constitutional basis for regulating the content of passports. He would have found, in the Vesting Clause of the Constitution, presidential control over all unenumerated powers originally understood as falling within the "executive power" of the federal government.[141] He outlined early precedent from the Washington Administration he viewed as confirmation that "Article II's Vesting Clause was originally understood to include a grant of residual foreign affairs power to the Executive."[142] The power to

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[134] *Id*. at 2096.

[135] *Id*. at 2095.

[136] *Id*. (citing legislative history that the Court interpreted as demonstrating that "Congress wanted to express its displeasure with the President's [Jerusalem] policy").

[137] *Zivotofsky II* at 2096 (Breyer, J., concurring).

[138] *Id*. at 2010 (Thomas, J., concurring in the judgment in part and dissenting in part).

[139] *Id*. at 2083 (majority opinion).

[140] *Id*. at 2011.

[141] Justice Thomas wrote:

> Specifically, the Vesting Clause of Article II provides that "[t]he executive Power shall be vested in a President of the United States." Art. II, § 1. This Clause is notably different from the Vesting Clause of Article I, which provides only that "[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States," Art. I, § 1 (emphasis added). By omitting the words "herein granted" in Article II, the Constitution indicates that the "executive Power" vested in the President is not confined to those powers expressly identified in the document. Instead, it includes all powers originally understood as falling within the "executive Power" of the Federal Government.

Id. at 2098. The majority expressly declined to address whether the Vesting Clause provides further support for its holding. *Id*. at 2086.

[142] *Id*. at 2099-2100.

issue passports, and to regulate their content, in his view "falls squarely within [the President's] residual foreign affairs power."[143]

Justice Thomas rejected the argument that the authority to regulate passports could be an exercise of Congress's foreign commerce or naturalization powers, and consequently could not be considered necessary and proper to carrying into execution these enumerated powers.[144] Moreover, he denied that Section 214(d) could be justified as an exercise of Congress's power under the Necessary and Proper Clause to enact laws to carry into execution the President's residual foreign affairs powers.[145] This was so, he argued, because the term "proper" connotes that "a law must fall within the peculiar competence of Congress under the Constitution," which includes conformance with separation-of-powers principles.[146] He disagreed with the majority's opinion regarding Section 214(d)'s impingement on the recognition power because "no act of recognition is implicated here."[147] He opined that "[r]ather than adopt a novel definition of the recognition power, the majority should have looked to other foreign affairs powers in the Constitution to resolve this dispute."[148]

Dissents

Justice Scalia wrote the principal dissent, joined by the Chief Justice and Justice Alito. In Justice Scalia's view, federal policy regarding the territorial claims of foreign nations is no different from other foreign policy-making endeavors under the Constitution: Congress and the President each exercise their respective powers based on their views of the matter.[149] He would have found congressional authority to enact the statute in question lodged in Congress's naturalization powers combined with the Necessary and Proper Clause.[150] Accordingly, he would have afforded Congress the right to "decide that recording birthplaces as 'Israel' makes for better foreign policy, [or] that regardless of international politics, a passport or birth report should respect its bearer's conscientious belief that Jerusalem belongs to Israel."[151] While recognizing that such congressional discretion is not without limits, Justice Scalia denied that the passport measure would transgress constitutional limitations.

Specifically, Justice Scalia disputed the holding that the provision implicated the recognition power, arguing that a birthplace annotation in a passport has never been understood to constitute a formal recognition under international law.[152] Accordingly, he would have found it unnecessary to determine whether the President holds that authority exclusively. But even if the Constitution

[143] *Id.* at 2101.

[144] *Id*. at 2105.

[145] *Id*.

[146] *Id*.

[147] *Id*. at 2111.

[148] *Id*. at 2112-*2113.

[149] *Zivotofsky II* at 2116 (Scalia, J., dissenting).

[150] *Id*. at 2117 ("As the Necessary and Proper Clause confirms, every congressional power "carries with it all those incidental powers which are necessary to its complete and effectual execution." Even on a miserly understanding of Congress's incidental authority, Congress may make grants of citizenship "effectual" by providing for the issuance of certificates authenticating them.")(citation omitted).

[151] *Id*. at 2117.

[152] *Id*.at 2118-19. Moreover, even if an annotation in a passport could be construed to cast doubt on the continuing validity of a recognition decision, Justice Scalia pointed out that the law would not have prohibited a disclaimer to preserve the recognition status. *Id.* at 2122.

does prevent Congress from granting recognition to foreign powers, in his view, it "nowhere obliges Congress to align its laws with the President's recognition decisions."[153]

Justice Scalia rejected the executive branch differentiation between permitting passport applicants to request a more local designation as their place of birth in place of the country, as contrasted with permitting the substitution of a country in lieu of a disputed locale, remarking that:

> Granting a request to specify "Israel" rather than "Jerusalem" does not recognize Israel's sovereignty over Jerusalem, just as granting a request to specify "Belfast" rather than "United Kingdom" does not derecognize the United Kingdom's sovereignty over Northern Ireland.[154]

He also objected to the majority's invocation of "functional considerations" (primarily the need to "speak with one voice" internationally) to undergird its analysis, emphasizing that such considerations will "systematically favor the unitary President over the plural Congress."[155]

Finally, after noting disagreement with Justice Thomas's concurrence, which would have regarded the power to issue passports an exclusive "residual" power of the President not subject to any congressional regulation, he summed up:

> A President empowered to decide all questions relating to [international disputes about statehood and territory], immune from laws embodying congressional disagreement with his position, would have un-controlled mastery of a vast share of the Nation's foreign affairs. ...That is not the chief magistrate under which the American People agreed to live when they adopted the national charter.[156]

Chief Justice Roberts, joined by Justice Alito, wrote a separate dissent to underscore the unprecedented nature of the decision:

> Today's decision is a first: Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs. We have instead stressed that the President's power reaches "its lowest ebb" when he contravenes the express will of Congress, "for what is at stake is the equilibrium established by our constitutional system."[157]

The Chief Justice articulated "serious doubts" with respect to the majority's inference of a preclusive and exclusive recognition power from the president's duty to receive ambassadors.[158] He found its examination of judicial precedence equally unpersuasive, remarking "[w]hen the best you can muster is conflicting dicta, precedent can hardly be said to support your side."[159] He faulted the majority's analysis of the admittedly ambiguous historical record, and argued that congressional acquiescence has previously been relevant only for judging executive actions in the absence of congressional authorization, not those in violation of statute.[160] But even if the President's recognition power is exclusive, he would have found the passport provision permissible as a measure without formal recognition implications.[161]

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[153] *Id*. at 2122 (providing examples to argue that "Congress has legislated without regard to recognition for a long time and in a range of settings").

[154] *Id*. at 2119.

[155] *Id*. at 2123.

[156] *Id*. at 2126.

[157] *Zivotofsky II* at 2113 (Roberts, C.J., dissenting)(citing *Youngstown* at 6 37–638 (Jackson, J., concurring)).

[158] *Id*.

[159] *Id*. at 2114.

[160] *Id*. (citing Medellín v. Texas, 552 U.S. 491, 528 (2008); Dames & Moore v. Regan, 453 U.S. 654, 678-79 (1981)).

[161] *Id*.

Chief Justice Roberts characterized the majority opinion as giving too much weight to concerns that Section 214(d) might cause a mistaken impression that U.S. policy on Jerusalem had changed, even though neither Congress nor the President had claimed that the provision actually required the recognition of Israel's sovereignty over Jerusalem. He argued:

> [E]xpanding the President's purportedly exclusive recognition power to include authority to avoid potential misunderstandings of legislative enactments proves far too much. Congress could validly exercise its enumerated powers in countless ways that would create more severe perceived contradictions with Presidential recognition decisions than does § 214(d). If, for example, the President recognized a particular country in opposition to Congress's wishes, Congress could declare war or impose a trade embargo on that country. A neutral observer might well conclude that these legislative actions had, to put it mildly, created a perceived contradiction with the President's recognition decision. And yet each of them would undoubtedly be constitutional. So too would statements by nonlegislative actors that might be seen to contradict the President's recognition positions, such as the declaration in a political party platform that "Jerusalem is and will remain the capital of Israel."[162]

Finally, he objected to the perceived expansion of the recognition power to include authority to avoid potential diplomatic misunderstandings as supportable only under the rejected executive assertion of the "exclusive authority to conduct diplomatic relations."[163]

Potential Implications for Congress

Although the *Zivotofsky II* majority repeatedly stressed that its holding is limited to matters involving the recognition power, and acknowledged Congress's ample foreign affairs authorities where formal recognition is not concerned, the outer bounds of the recognition power remain somewhat unclear. The holding may be read as limited to legislation that somehow hinders the President's ability to "maintain [a recognition] determination in his and his agent's statements."[164] If the opinion is limited to the actual extension (or withdrawal) of formal recognition with respect to a foreign state, including decisions regarding the territory over which recognized states exercise sovereignty, then it may have few implications for foreign policy legislation. The Court demonstrated that the executive branch has exercised nearly exclusive authority over such decisions in the past, receiving little pushback from Congress. If that is the case, then the Court's disabling of Congress from acting on the subject of recognition may not matter much. Moreover, the Court's neutering of certain language from *Curtiss-Wright* may prove beneficial for advocates of a strong role for Congress in foreign affairs.

On the other hand, part of the Court's rationale for determining that the recognition power must reside exclusively in the President, that is, that "assurances" regarding attributes of sovereignty such as immunity in U.S. courts and so forth, "cannot be equivocal"[165] stands in considerable tension with its later observation that formal recognition would seem "hollow" if unaccompanied by sovereign privileges, such as improved trade relations and the sending of an ambassador.[166]

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[162] *Id*.

[163] *Id.* at 2115.

[164] *Id*. at 2094-95.

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

[166] *Id*. at 2087 ("Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador,

The Court seems to have acknowledged that Congress's exercise of its constitutional powers could affect such attributes of sovereignty. The Court did not suggest, for example, that the Taiwan Relations Act was unconstitutional for according Taiwan essentially all of the privileges of sovereignty under U.S. law even though the President had withdrawn its recognition as a foreign state.[167] Instead, the Court cast that act as a congressional effort to make policy provisions that "in its judgment, were appropriate in light of [the President's withdrawal of recognition] decision."[168] In that light, it might be asked whether Congress could remove the waiver authority regarding the spending authority from the Jerusalem Embassy Act or outright insist that the U.S. Embassy to Israel be moved to Jerusalem. Or whether Congress could have constitutionally prevented the upgrading of the Cuban Interests Section in Washington, or the U.S. Interests Section in Havana, to full-fledged embassies.[169] The Court suggested that Congress could constitutionally impede foreign relations by refusing to appropriate money for an embassy in a recognized state.[170] Yet such a law would seem to pose a more serious contradiction with U.S. recognition policy than the passport measure would have caused.

Questions may arise as to which exercises of congressional authority might impermissibly force the executive branch to contradict an earlier recognition decision, as opposed to those laws that merely interfere with sovereign privileges accorded to a foreign state. For example, because immunity from court actions may be considered an attribute of sovereignty that flows from official recognition, is a law that revokes foreign sovereign immunity from certain states constitutional if it collides with executive branch policy? Congress enacted the Foreign Sovereign Immunities Act (FSIA)[171] to govern which lawsuits may be brought against foreign states. Although the FSIA may be viewed as another example where Congress codified executive branch policy, the two branches have sometimes clashed over matters involving the sovereign immunity of states designated by the State Department as state sponsors of terrorism.[172] The President has the authority to remove states from that category under certain circumstances, which may include the recognition of a new government in such a state. Can Congress make the assets of such a redeemed state subject to the execution of a terrorism judgment despite the President's recognition decision? U.S. practice suggests Congress has that authority.[173] Does *Zivotofsky II*

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the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress.").

[167] The Court did not address the separately passed Taiwan passport measure, upon which the Jerusalem measure was modeled. That measure, 22 U.S.C. §2705 note, permits U.S. citizens born on Taiwan to list "Taiwan" as their birthplace in lieu of "China," in contrast with previous policy, in which the State Department permitted Taiwan-born citizens to specify a city or locale but not "Taiwan" as their place of birth.

[168] *Zivotofsky II* at 2093.

[169] *See* H.R. 2772, Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, §7045(c)(3), which would prohibit funds for the establishment or operation of a U.S. diplomatic presence, including an Embassy, consulate, or liaison office in Cuba beyond that which was in existence prior to December 17, 2014, until the President determines a transition government is in place and other criteria are met. For background on the reestablishment of diplomatic relations with Cuba, see CRS Report R43926, *Cuba: Issues for the 114th Congress*, by Mark P. Sullivan.

[170] *Zivotofsky II* at 2087.

[171] 28 U.S.C. §§1602 *et seq*.

[172] For background on the FSIA terrorism exception, see CRS Report RL31258, *Suits Against Terrorist States by Victims of Terrorism*, by Jennifer K. Elsea. Currently, Iran, Syria, and Sudan are the only designated State Sponsors of Terrorism. *See* http://www.state.gov/j/ct/list/c14151.htm.

[173] 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 (110th Cong.). 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*

call that authority into question as possibly forcing the President to contradict a recognition decision? Or is it a constitutional problem only if an official communication that contradicts the recognition is required? Does it matter whether the congressional action is supported by an expressly enumerated power?

Language in the pending National Defense Authorization Act for Fiscal Year 2016 (FY2016 NDAA), H.R. 1735 may present questions under *Zivotofsky II*. For example, Cuba has objected to the presence of the U.S. naval station at Guantanamo Bay as illegal, and has long called for its return to Cuba. Cuban President Raul Castro has called for the United States to return the base for the full normalization of U.S.-Cuban relations.[174] Two provisions in the House-passed version of the FY2016 NDAA would prohibit the President from agreeing to return the territory to Cuba.[175] The Obama Administration has stated it has no intention of ceding the Guantanamo lease, so perhaps these provisions would be viewed as supporting the executive branch. Another measure in the House-passed version of the FY2016 NDAA, however, would direct the Administration to provide military aid directly to the Kurdistan Regional Government *peshmerga* (militia) and certain other sub-national forces in Iraq.[176] The Obama Administration has strongly objected to the provision on the basis that it treats each of the named entities as "a country for certain assistance purposes" and could cause the United States to violate Iraq's sovereignty.[177] While these examples may well fall into the categories of foreign relations legislation that remain open to Congress under the Court's analysis, they could also arguably contradict the Executive's decisions regarding sovereignty over territory and impede the nation's ability to speak with one voice during diplomatic negotiations.

The *Zivotofsky II* opinion may have implications beyond the narrowly defined constitutional power to recognize (or derecognize) foreign states. Specifically, it may boost the buoyancy of future claims of exclusive executive power at *Youngstown's* "lowest ebb" by emphasizing the functional considerations and diminishing the weight of any historical evidence of congressional participation. The *Zivotofsky II* majority was not persuaded by examples of congressional involvement in matters of recognition because these "establishe[d] no more than that some Presidents have chosen to cooperate with Congress, not that Congress itself has exercised the recognition power." Likewise, the text of Article II granting powers to the Senate to approve treaties and the appointment of ambassadors was viewed as supporting exclusivity in the executive branch because the Senate cannot perform the related executive functions on its own. If Congress has a share in only those powers that it can exercise by itself, it could be argued that legislative powers may find themselves at a consistent disadvantage in the *Youngstown* calculus.

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http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_documents&docid=f:hd088.110. In response, Congress passed a new bill that included waiver authority with respect to Iraqi sovereign immunity, P.L. 110-181 §1083(d). Similarly, legislation was deemed necessary to restore Libya's sovereign immunity after the Ghaddafi regime was deposed. *See* CRS Report RL31258, *Suits Against Terrorist States by Victims of Terrorism*, by Jennifer K. Elsea.

[174] *See U.S. Must Return Guantanamo for Normal Relations With Cuba, Raúl Castro Says*, ASSOCIATED PRESS, January 28, 2015.

[175] Section 1059 would prohibit closure or abandonment of the base unless authorized by law or by treaty ratified with the advice and consent of the Senate. Section 1060 would prohibit, until December 31, 2016, the expenditure of Department of Defense funds to close or abandon the base; relinquish control of the territory on which it is situated to the Republic of Cuba; or modify the 1934 treaty with Cuba related to Guantanamo, except with the advice and consent of the Senate. For an analysis of the President's authority to return Guantanamo Bay to Cuba without congressional authority, see CRS Report R44137, *Naval Station Guantanamo Bay: History and Legal Issues Regarding Its Lease Agreements*, by Jennifer K. Elsea and Daniel H. Else.

[176] H.R. 1735 §1223 (engrossed in the House, 114th Cong.).

[177] Executive Office of the President, Statement of Administration Policy on H.R. 1735, at 7 (House Rules), May 12, 2015, available at https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr1735r_20150512.pdf.

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