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IN THE EYES OF THE PRESIDENT— SUPREME COURT HOLDS EXECUTIVE BRANCH HAS EXCLUSIVE POWER TO RECOGNIZE FOREIGN SOVEREIGNTIES

*Jennifer Trejo**

THE power to recognize foreign sovereignties is the bedrock of American foreign policy, and the U.S. Supreme Court has decided that only the executive branch may exercise that influential power.¹ Although dissenters and some separation of powers scholars argue that Congress should have a voice in recognizing foreign sovereignties, *Zivotofsky v. Kerry* was correct in deciding that the recognition power belongs firmly in the hands of one branch and, thus, that section 214(d) of the Foreign Relations Authorization Act (the Act) is unconstitutional.² The Supreme Court appropriately interpreted constitutional text, historical context, and America's need for firm and explicit diplomatic policies.³ In a global climate fraught with conflict, it is essential for the recognition power to be in the sole hands of the executive branch, the Nation's face in foreign affairs, as opposed to the legislative branch, which is divided by biased political voices.

The Israeli-Palestinian conflict over Jerusalem has plagued the Middle East for decades, causing the Holy City to be torn between two violent parties, each one seeking to claim Jerusalem as its capital.⁴ The President's position on Jerusalem is reflected in the State Department's Foreign Affairs Manual and its application to foreign-born citizens seeking passports.⁵ Since 1948, presidents have refused to recognize any country's sovereignty over Jerusalem.⁶ The United States reflected this foreign pol-

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1. *See Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094 (2015).

2. *See id.*

3. *See id.* at 2088–94.

4. *See id.* at 2081.

5. *See id.* at 2082 (citing U.S. Dep't of State, 7 Foreign Affairs Manual § 1383.5-6 (1987)).

6. *See id.* at 2081.

icy stance in section 1383.5-6 of the Foreign Affairs Manual, mandating that citizens born in Jerusalem record their place of birth solely as "Jerusalem," excluding any mention of Israel, Jordan, or Palestine.⁷ In 2002, in direct contradiction with the Foreign Affairs Manual, Congress passed the Act, which allows citizens born in Jerusalem to list their place of birth as "Israel."⁸ The enactment of section 214(d) sought to override the Foreign Affairs Manual and its provisions towards Jerusalem born citizens, which ultimately resulted in violent protests in the already unstable city of Jerusalem.⁹ Overseas, the world questioned what side of the peace process America was truly on, while at home the executive branch and the legislative branch collided over who held the power to recognize sovereignty.¹⁰

In 2002, after the Act had passed, Menachem Zivotofsky was born to U.S. citizens living in Jerusalem.¹¹ Menachem's parents requested that the place of birth on his passport be listed as "Jerusalem, Israel," contending that the Act gave them this right.¹² When the American Embassy denied their request, citing the Foreign Affairs Manual, Zivotofsky's parents brought suit in the United States District Court for the District of Columbia, seeking to enforce section 214(d) of the Act.¹³ The district court dismissed the suit, holding that it presented a non-justiciable political question and that Zivotofsky lacked standing.¹⁴ The Court of Appeals for the District of Columbia affirmed the district court's political question holding.¹⁵ On a grant of certiorari, the Supreme Court vacated the judgment and remanded the case.¹⁶ On remand, the court of appeals held that section 214(d) impermissibly intruded on an executive branch power, determining that "the President exclusively holds the power to determine whether to recognize a foreign sovereign," thus, "section 214(d) directly contradicts a carefully considered exercise of the Executive branch's recognition power."¹⁷ The Supreme Court again granted certiorari.¹⁸

In a landmark decision, the Supreme Court settled the inter-branch dispute in favor of the executive branch, holding that "the power to recog-

7. See *id.* at 2082 (citing U.S. Dep't of State, 7 Foreign Affairs Manual § 1383.5-6 (1987)).

8. See Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. N. 107-228, § 214(d), 116 Stat. 1350, (2002) ("For purposes of the . . . issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.").

9. See *Zivotofsky*, 135 S. Ct. at 2082; James Bennett, *Guards Stop Suicide Attack Near U.S. Embassy in Israel*, N.Y. TIMES, Oct. 12, 2002, <http://www.nytimes.com/2002/10/12/world/guards-stop-suicide-attack-near-us-embassy-in-israel.html> [<http://perma.cc/2RNN-GBJL>].

10. See Foreign Relations Authorization Act § 214(d).

11. See *Zivotofsky*, 135 S. Ct. at 2083.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

nize or decline to recognize a foreign state and its territorial bounds resides in the President alone,” thus finding that section 214(d) of the Act is unconstitutional.¹⁹ In reaching this decision, the Supreme Court began its analysis by referring to Justice Jackson’s famous tripartite framework outlined in *Youngstown Sheet & Tube Co. v. Sawyer*.²⁰ According to Justice Jackson’s analysis, the President’s refusal to implement section 214(d) in place of the Foreign Affairs Manual places the President’s power “at its lowest ebb,” thus his actions must be “scrutinized with caution” and he must rely solely upon powers the Constitution grants him.²¹ The Supreme Court considered (1) the specific language and initial interpretation of Article II of the Constitution, including the structure of the Constitution and the powers it grants to both the legislative and executive branch, (2) the purpose and policy making exclusive presidential power necessary, and (3) the precedent and history of presidential recognition and congressional acquiescence.²² After holding that the recognition power belonged exclusively to the executive branch, the Supreme Court held section 214(d) of the Act unconstitutional.²³

To begin, the Supreme Court focused on the Reception Clause of Article II, which states that the President “shall receive Ambassadors and other public Ministers.”²⁴ The Court reflected back on the Nation’s early history, noting that, when President Washington recognized the French Revolutionary Government by receiving its ambassador, Alexander Hamilton felt compelled to explain the importance of the clause, namely that it “includes the power of judging . . . whether the new rulers . . . ought to be recognized.”²⁵ At the time of founding, other scholars similarly acknowledged that receiving ambassadors was “tantamount to recognizing the sovereignty of the sending state” by correlating the receiving of ambassadors with accepting a state’s sovereignty.²⁶ The Supreme Court thus found that the foreign affairs powers given to the President under Article II bestowed upon him the power to control all recognition decisions and to do so on his own initiative.²⁷ The Court cited the presidential power to negotiate treaties; the ability to nominate and appoint ambassadors, public ministers, and consuls; and the sole power to open

19. *Id.* at 2094.

20. *Id.* at 2083–84; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

21. *Zivotofsky*, 135 S. Ct. at 2084 (citing *Youngstown*, 343 U.S. at 638).

22. *Id.* at 2084–95.

23. *Id.* at 2094–96.

24. *Id.* at 2085 (quoting U.S. CONST. art. II § 3).

25. *Id.* (quoting A. Hamilton, *Pacificus No. 1*, *The Letters of Pacificus and Helvidius* 5, 12–14 (1845) (“[The Reception Clause] includes [the power] of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and out to be recognized, or not.”)).

26. *Id.* (quoting E. DE VATTTEL, *THE LAW OF NATIONS*, p. 461 (1758) (J. Chitty ed., 1853) (“[E]very state, truly possessed of sovereignty, has a right to send ambassadors [and] to contest their right in this instance [is equivalent to] contesting their sovereign dignity.”)).

27. *Id.* (citing U.S. CONST. art. II § 2).

diplomatic relations by engaging with foreign leaders.²⁸ In finding that the Constitution unequivocally granted the power to recognize foreign sovereignties, the Court contrasted Article II with the powers granted to Congress under Article I and found that Congress has no constitutional power to initiate diplomatic relations with foreign nations.²⁹

After determining that the text and structure of the Constitution grants the President the power to recognize foreign nations, the Court went on to hold that this power was given exclusively to the President.³⁰ The Court began with an analysis of the policy implications that the recognition power held.³¹ Opining on the Nation's need for "a single policy regarding which governments are legitimate in the eyes of the United States" and on foreign ambassadors' need to know "before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received," the Court noted specifically that "these assurances cannot be equivocal."³² Further, the Court held that "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."³³ And though Congress has a substantial role in making laws, which gives it authority to determine policy incident to recognition of foreign sovereigns, if the President is effectively to recognize nations, "it must be evident to his counterparts abroad that he speaks for the Nation on that precise question."³⁴

Finally, the Court turned to precedent and historical congressional acquiescence to emphasize that the recognition power belongs exclusively to the executive branch.³⁵ The Court cited cases, including *United States v. Curtiss-Wright Export Corp.*,³⁶ confirming the President's role as "the sole organ of the government in the field of international relations" and supporting the conclusion that the President alone has the power to recognize the legitimacy of foreign nations.³⁷ The Supreme Court examined the years of congressional acquiescence of Presidents exclusively recognizing foreign nations.³⁸ The first act of recognition came from President Washington in his recognition of the new French government, illustrated by his acceptance of the French Ambassador to the United States with minimal interference from Congress.³⁹ The Court went on to note similar

28. *Id.* at 2086 (citing U.S. CONST. art. II § 2, cl. 2).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 2087.

35. *Id.* at 2088-94.

36. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

37. *See Zivotofsky*, 135 S. Ct. at 2088-90 (citing *United States v. Belmont*, 301 U.S. 324, 330 (1937); *United States v. Pink*, 315 U.S. 203, 229 (1942)).

38. *Zivotofsky*, 135 S. Ct. at 2091-94.

39. *Id.* at 2091-92 (citing Prakash & Ramsey, *The Executive Power Over Foreign Affairs*, 111 *YALE L.J.* 231, 312 (2001)).

recognition acts from President Monroe and South America,⁴⁰ President Jackson and Texas,⁴¹ President Lincoln and Liberia and Haiti,⁴² President McKinley and Cuba,⁴³ and President Carter and the People's Republic of China,⁴⁴ all of which establish a trend of acquiescence by Congress in allowing the President to recognize foreign nations exclusively. The Court firmly held that 100 years of historical evidence indicates Congress's acceptance that the recognition power is "exclusive to the Presidency."⁴⁵ As a result of this holding, the Court found section 214(d) of the Act to directly contradict the executive's prior recognition determination in the Foreign Affairs Manual.⁴⁶ Thus, section 214(d) was rightly held unconstitutional.

Dissenting Justices Scalia, Alito, and Roberts wrote chiding dissents criticizing the majority's disregard of the separation of powers.⁴⁷ Justice Roberts, whom Justice Alito joined, focused on the constitutional construction of Article II and contended that the Reception Clause stood alongside the "duties imposed on the President" not the "powers granted to him by Article II, Section 2."⁴⁸ Roberts went on to criticize the majority's interpretation of historical precedent and asserted that the legislative and executive branches share the recognition power.⁴⁹ Similarly, Justice Scalia criticized the majority's interpretation of history, noting that historical precedent does not acknowledge the recognition power as exclusive.⁵⁰ He further argued that section 214(d) does not concern recognition, and that therefore there is no need to hold it unconstitutional, stating that placing "Israel" on a passport is a "deference to private requests" and not "a grant of recognition."⁵¹ Lastly, Justice Scalia noted his fears that the majority's holding will threaten congressional power over foreign affairs and erode the very principle of separation of powers.⁵² While the dissenting opinions' contentions have merit, they are ultimately incorrect and fail to acknowledge the necessity of having the recognition power solely within the executive branch.

The Supreme Court correctly held that the recognition power belongs exclusively to the President, especially when the slightest indication of foreign recognition has the power to invoke political crises overseas. The

40. *Id.* at 2092 (citing JULIUS GOEBEL, *THE RECOGNITION POLICY OF THE UNITED STATES*, pp. 121–25 (1915)).

41. *Id.* at 2093 (citing GOEBEL, *THE RECOGNITION POLICY OF THE UNITED STATES*, pp. 144–47 (1915)).

42. *Id.*

43. *Id.*

44. *Id.* at 2094 (citing *Taiwan Relations Act: Hearings on Taiwan Legislation Before the H. Comm. on Foreign Affairs*, 96th Cong. 2–6 (1979)).

45. *Id.*

46. *Id.*

47. *Id.* at 2116–2126 (Scalia, J., Roberts, C.J., Alito, J., dissenting).

48. *Id.* at 2113 (Roberts, C.J., dissenting).

49. *See id.* at 2114.

50. *See id.* at 2118 (Scalia, J., dissenting).

51. *See id.* at 2119.

52. *See id.* at 2125–26.

dissenters confined their analyses of the separation of powers by viewing the issue through a narrow lens defined by political history and domestic politics.⁵³ The dissenters neglected to recognize the magnitude of the effect that the recognition power has on diplomatic relationships and the impact it has on the global community.⁵⁴ In this case, Congress's potentially inadvertent recognition of Israeli sovereignty over Jerusalem sparked rampant violence in the states surrounding Jerusalem.⁵⁵ In one fell swoop, Congress had seemingly altered the United States' position over Jerusalem's sovereignty, thereby dismissing years of U.S. neutrality in the Israeli-Palestinian conflict.⁵⁶ After years of violent protests and heated opposition in response to the initial passing of the Act,⁵⁷ the Supreme Court struck down section 214(d) in hopes of restoring U.S. neutrality, but once again contention erupted: the chief Palestinian negotiator praised the decision, stating "it sends a clear message to Israel that its policies of colonization are null and void," while the Jerusalem Mayor responded by saying that "Jerusalem was and always will be the capital of Israel, and the heart and soul of the Jewish people."⁵⁸ Foreign diplomacy is fragile in today's combative global environment, and the relationships it fosters can be altered or broken in an instant. Because the President commands American foreign relations agents, the executive branch is the voice of the United States and the leader to whom the world turns for answers.⁵⁹ When making the decision as to whom the recognition power belongs, one cannot dwell in the past, but instead must look to the current state of affairs and the erratic foreign climate that only the President has the power to control.

Furthermore, Congress is poorly constructed and lacks the ability to perform effectively under the tight time constraints often involved in foreign diplomacy. Congress is a 535-member debating body often divided by partisan politics.⁶⁰ If Congress were to control the recognition of foreign nations, it would need to pass legislation to make its decisions legally effective; such actions require Congress to satisfy the bicameralism and presentment requirements.⁶¹ The presentment clauses require Congress

53. *See id.* at 2113–26.

54. *See id.*

55. *See Thousands protest in Gaza against US support of Israeli claim to Jerusalem*, THE DAILY STAR LEBANON (Oct. 5, 2002), <http://www.dailystar.com.lb/News/Lebanon-News/2002/Oct-05/15596-thousands-protest-in-gaza-against-us-support-of-israeli-claim-to-jerusalem.ashx> [perma.cc/SW2L-7BAU].

56. *See* Brief for the Respondent at 4, *Zivotovsky v. Kerry*, 135 S. Ct. 2076 (2015) (No. 13-628) (quoting Letter from George P. Schulz, "U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition [of Jerusalem] as a city located within the sovereignty territory of Israel").

57. *See* THE DAILY STAR LEBANON, *supra* note 57.

58. Adam Liptak, *Supreme Court Backs White House on Jerusalem Passport Dispute*, N.Y. TIMES, June 9, 2015, at A1.

59. *See* Harold Hongji Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1291–97 (1988).

60. *See id.*

61. *I.N.S. v. Chadha*, 462 U.S. 919, 946–51 (1983).

to present all legislation to the President, while bicameralism requires “the concurrence of the prescribed Members of both Houses” after a “full study and debate in separate settings” of the issues.⁶² In contrast to Congress’s protracted decision-making process, the presidency is ideally structured for the exercise of the recognition power. The President has the independence and discretion necessary to make decisions about recognition quickly and without hesitation.⁶³ The President is in a better position to recognize foreign sovereignties in the short timeframes that are required to maintain stable diplomatic relations and to prevent the tension that arises from forcing countries to wait for a decision.⁶⁴

The Supreme Court’s decision in *Zivotofsky* came at a time of strained relations between President Obama and Israeli Prime Minister Benjamin Netanyahu. Though the two nations are allied militarily, the personal relationship between the leaders has grown increasingly contentious regarding U.S. nuclear negotiations with Iran.⁶⁵ The Court’s decision, therefore, may disrupt diplomatic relations between the two countries even further, perhaps forcing the United States to take a more explicit stance on recognizing either Israeli or Palestinian sovereignty as it relates to Jerusalem.⁶⁶

The Court found section 214(d) of the Act unconstitutional, and held that passports for citizens born in Jerusalem cannot bear the word “Israel,” ultimately settling the inter-branch dispute over the recognition power.⁶⁷ The President alone has the structural power necessary to carry out the delicate task of recognizing foreign nations, and he or she alone can provide assurances to unstable foreign nations on the brink of war over issues of sovereignty and recognition. As the Supreme Court has correctly held, constitutional text, structure, and historical interpretation support the undeniable conclusion that the recognition power belongs exclusively to the executive branch.⁶⁸

62. *Id.* at 948–49.

63. *See* *United States v. Curtiss-Wright*, 299 U.S. 304, 319 (1936).

64. *See* Koh, *supra* note 59, at 1291–97.

65. *See* Robert Barnes, *Supreme Court Says President’s Powers Prevail on Foreign Borders*, WASH. POST (June 8, 2015), https://www.washingtonpost.com/politics/courts_law/supreme-court-strikes-down-born-in-jerusalem-passport-law/2015/06/08/19562bb2-d71d-11e4-ba28-f2a685dc7f89_story.html [perma.cc/2N3J-6AKV].

66. *See id.*

67. *See* *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094–96 (2015).

68. *See id.*

