Constitutional Law I

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Spring 2025

Supplemental Reading #2 (*Zivotofsky v. Kerry*)

**Supreme Court of the United States**

**Menachem Binyamin ZIVOTOFSKY, By His Parents and Guardians, Ari Z. and Naomi Siegman Zivotofsky, Petitioner**

**v.**

[**John KERRY**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(5048923533)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)**, Secretary of State.**

No. 13–628.

Argued Nov. 3, 2014. Decided June 8, 2015.

135 S. Ct. 2076 (2015)

**Justice KENNEDY delivered the opinion of the Court.**

…

The Court addresses two questions to resolve the interbranch dispute now before it. First, it must determine whether the President has the exclusive power to grant formal recognition to a foreign sovereign. Second, if he has that power, the Court must determine whether Congress can command the President and his Secretary of State to issue a formal statement that contradicts the earlier recognition. The statement in question here is a congressional mandate that allows a United States citizen born in Jerusalem to direct the President and Secretary of State, when issuing his passport, to state that his place of birth is “Israel.”

**I**

**A**

Jerusalem's political standing has long been, and remains, one of the most sensitive issues in American foreign policy, and indeed it is one of the most delicate issues in current international affairs. In 1948, President Truman formally recognized Israel in a signed statement of “recognition.” That statement did not recognize Israeli sovereignty over Jerusalem. Over the last 60 years, various actors have sought to assert full or partial sovereignty over the city, including Israel, Jordan, and the Palestinians. Yet, in contrast to a consistent policy of formal recognition of Israel, neither President Truman nor any later United States President has issued an official statement or declaration acknowledging any country's sovereignty over Jerusalem. Instead, the Executive Branch has maintained that “the status of Jerusalem ... should be decided not unilaterally but in consultation with all concerned.” … In a letter to Congress then-Secretary of State Warren Christopher expressed the Executive's concern that “[t]here is no issue related to the Arab–Israeli negotiations that is more sensitive than Jerusalem.” He further noted the Executive's opinion that “any effort ... to bring it to the forefront” could be “very damaging to the success of the peace process.”

The President's position on Jerusalem is reflected in State Department policy regarding passports and consular reports of birth abroad. Understanding that passports will be construed as reflections of American policy, the State Department's Foreign Affairs Manual [FAM] instructs its employees, in general, to record the place of birth on a passport as the “country [having] present sovereignty over the actual area of birth.” If a citizen objects to the country listed as sovereign by the State Department, he or she may list the city or town of birth rather than the country. The FAM, however, does not allow citizens to list a sovereign that conflicts with Executive Branch policy. Because the United States does not recognize any country as having sovereignty over Jerusalem, the FAM instructs employees to record the place of birth for citizens born there as “Jerusalem.”

In 2002, Congress passed the Act at issue here, the Foreign Relations Authorization Act, Fiscal Year 2003. Section 214 of the Act is titled “United States Policy with Respect to Jerusalem as the Capital of Israel.”  The subsection that lies at the heart of this case, § 214(d), addresses passports. That subsection seeks to override the FAM by allowing citizens born in Jerusalem to list their place of birth as “Israel.” Titled “Record of Place of Birth as Israel for Passport Purposes,” § 214(d) states “[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.”

When he signed the Act into law, President George W. Bush issued a statement declaring his position that § 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.” …

**B**

In 2002, petitioner Menachem Binyamin Zivotofsky was born to United States citizens living in Jerusalem. In December 2002, Zivotofsky's mother visited the American Embassy in Tel Aviv to request both a passport and a consular report of birth abroad for her son.  She asked that his place of birth be listed as “Jerusalem, Israel.”  The Embassy clerks explained that, pursuant to State Department policy, the passport would list only “Jerusalem.” Zivotofsky's parents objected and, as his guardians, brought suit … seeking to enforce § 214(d).

…

[The lower courts rejected Zivotofsky’s claim.]

**II**

In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635–638, (1952) (concurring opinion). The framework divides exercises of Presidential power into three categories: First, 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 possesses in his own right plus all that Congress can delegate.” Second, “in absence of either a congressional grant or denial of authority” there is a “zone of twilight in which he and Congress may have concurrent authority,” and where “congressional inertia, indifference or quiescence may” invite the exercise of executive power. Finally, when “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.

In this case the Secretary contends that § 214(d) infringes on the President's exclusive recognition power by “requiring the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns.” In so doing the Secretary acknowledges the President's power is “at its lowest ebb.” 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. …

**A**

Recognition is a “formal acknowledgement” that a particular “entity possesses the qualifications for statehood” or “that a particular regime is the effective government of a state.” [Restatement (Third) of Foreign Relations Law of the United States § 203](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=0289476732&pubNum=0102182&originatingDoc=Ib051de840dcd11e5b4bafa136b480ad2&refType=TS&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), Comment *a,* p. 84 (1986). It may also involve the determination of a state's territorial bounds. See 2 M. Whiteman, Digest of International Law § 1, p. 1 (1963). …

Despite the importance of the recognition power in foreign relations, the Constitution does not use the term “recognition,” either in Article II or elsewhere. The Secretary asserts that the President exercises the recognition power based on the Reception Clause, which directs that the President “shall receive Ambassadors and other public Ministers.” Art. II, § 3.

As Zivotofsky notes, the Reception Clause received little attention at the Constitutional Convention. In fact, during the ratification debates, Alexander Hamilton claimed that the power to receive ambassadors was “more a matter of dignity than of authority,” a ministerial duty largely “without consequence.” The Federalist No. 69, p. 420 (C. Rossiter ed. 1961).

At the time of the founding, however, prominent international scholars suggested that receiving an ambassador was tantamount to recognizing the sovereignty of the sending state. See E. de Vattel, The Law of Nations § 78, p. 461 (1758) (J. Chitty ed. 1853); … 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.

This in fact occurred early in the Nation's history when President Washington recognized the French Revolutionary Government by receiving its ambassador. After this incident the import of the Reception Clause became clear—causing Hamilton to change his earlier view. He wrote that the Reception Clause “includes th[e 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 ought to be recognised, or not.” As a result, the Reception Clause provides support, although not the sole authority, for the President's power to recognize other nations.

The inference that the President exercises the recognition power is further supported by his additional Article II powers. It is for the President, “by and with the Advice and Consent of the Senate,” to “make Treaties, provided two thirds of the Senators present concur.” Art. II, § 2, cl. 2. In addition, “he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors” as well as “other public Ministers and Consuls.”

As a matter of constitutional structure, these additional powers give the President control over recognition decisions. …

The text and structure of the Constitution grant the President the power to recognize foreign nations and governments. The question then becomes whether that power is exclusive. 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. 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; 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.

Recognition is a topic on which the Nation must speak with one voice. … That voice must be the President's. 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 Federalist No. 70, p. 424 (A. Hamilton). 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.

As described in more detail below, the President since the founding has exercised this unilateral power to recognize new states—and the Court has endorsed the practice. Texts and treatises on international law treat the President's word as the final word on recognition. ...

It remains true, of course, that many decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action. 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.  The President, furthermore, could not build an American Embassy abroad without congressional appropriation of the necessary funds. Under basic separation-of-powers principles, it is for the Congress to enact the laws …

In foreign affairs, as in the domestic realm, the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” *Youngstown,* 343 U.S., at 635 (Jackson, J., concurring). 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.

…

A clear rule that the formal power to recognize a foreign government subsists in the President therefore serves a necessary purpose in diplomatic relations. All this, of course, underscores that Congress has an important role in other aspects of foreign policy, and the President may be bound by any number of laws Congress enacts. In this way ambition counters ambition, ensuring that the democratic will of the people is observed and respected in foreign affairs as in the domestic realm. See The Federalist No. 51, p. 322 (J. Madison).

**B**

No single precedent resolves the question whether the President has exclusive recognition authority and, if so, how far that power extends. In part that is because, until today, the political branches have resolved their disputes over questions of recognition. The relevant cases, though providing important instruction, address the division of recognition power between the Federal Government and the States … [extensive historical discussion is omitted].

In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. It is not for the President alone to determine the whole content of the Nation's foreign policy.

That said, judicial precedent and historical practice teach that it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate, both for the Nation as a whole and for the purpose of making his own position clear within the context of recognition in discussions and negotiations with foreign nations. Recognition is an act with immediate and powerful significance for international relations, so the President's position must be clear. Congress cannot require him to contradict his own statement regarding a determination of formal recognition.

Zivotofsky's contrary arguments are unconvincing. The decisions he relies upon are largely inapposite. … [The Court distinguished various cases.]

**C**

Having examined the Constitution's text and this Court's precedent, it is appropriate to turn to accepted understandings and practice. … But even a brief survey of the major historical examples, with an emphasis on those said to favor Zivotofsky, establishes no more than that some Presidents have chosen to cooperate with Congress, not that Congress itself has exercised the recognition power.

From the first Administration forward, the President has claimed unilateral authority to recognize foreign sovereigns. …

The first debate over the recognition power arose in 1793, after France had been torn by revolution. See Prakash & Ramsey, [The Executive Power over Foreign Affairs, 111 Yale L.J. 231, 312 (2001)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=0287292516&pubNum=0001292&originatingDoc=Ib051de840dcd11e5b4bafa136b480ad2&refType=LR&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Once the Revolutionary Government was established, Secretary of State Jefferson and President Washington, without consulting Congress, authorized the American Ambassador to resume relations with the new regime. Soon thereafter, the new French Government proposed to send an ambassador, Citizen Genet, to the United States. Members of the President's Cabinet agreed that receiving Genet would be a binding and public act of recognition. They decided, however, both that Genet should be received and that consultation with Congress was not necessary. Congress expressed no disagreement with this position, and Genet's reception marked the Nation's first act of recognition—one made by the President alone. …

[The Court discussed various other recognition controversies.]

This history confirms the Court's conclusion in the instant case that the power to recognize or decline to recognize a foreign state and its territorial bounds resides in the President alone. For the most part, Congress has respected the Executive's policies and positions as to formal recognition. At times, Congress itself has defended the President's constitutional prerogative. Over the last 100 years, there has been scarcely any debate over the President's power to recognize foreign states. In this respect the Legislature, in the narrow context of recognition, on balance has acknowledged the importance of speaking “with one voice.”  The weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency.

**III**

As the power to recognize foreign states resides in the President alone, the question becomes whether § 214(d) infringes on the Executive's consistent decision to withhold recognition with respect to Jerusalem. …

…

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. This conclusion is a matter of both common sense and necessity. If Congress could command the President to state a recognition position inconsistent with his own, Congress could override the President's recognition determination. Under international law, recognition may be effected by written or oral declaration of the recognizing state. In addition an act of recognition must leave no doubt as to the intention to grant it. Thus, if 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.

As Justice Jackson wrote in *Youngstown,* when a Presidential power is “exclusive,” it “disabl[es] the Congress from acting upon the subject.” Here, the subject is quite narrow: The Executive's exclusive power extends no further than his formal recognition determination. But as to that determination, Congress may not enact a law that directly contradicts it. This is not to say Congress may not express its disagreement with the President in myriad ways. For example, it may enact an embargo, decline to confirm an ambassador, or even declare war. But none of these acts would alter the President's recognition decision.

If Congress may not pass a law, speaking in its own voice, that effects formal recognition, then it follows that it may not force the President himself to contradict his earlier statement. …

The flaw in § 214(d) is further underscored by the undoubted fact that the purpose of the statute was to infringe on the recognition power... The statute is titled “United States Policy with Respect to Jerusalem as the Capital of Israel.” The House Conference Report proclaimed that § 214 “contains four provisions related to the recognition of Jerusalem as Israel's capital.”  And, indeed, observers interpreted § 214 as altering United States policy regarding Jerusalem—which led to protests across the region. From the face of § 214, from the legislative history, and from its reception, it is clear that Congress wanted to express its displeasure with the President's policy by, among other things, commanding the Executive to contradict his own, earlier stated position on Jerusalem. This Congress may not do.

…

The judgment of the Court of Appeals for the District of Columbia Circuit is

*Affirmed.*

[Opinions of Justice Breyer, concurring, and Justice Thomas, concurring in the judgment in part and dissenting in part, are omitted]

**Chief Justice ROBERTS, with whom Justice ALITO joins, dissenting.**

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.” [Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–638 (1952)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1952120254&pubNum=0000708&originatingDoc=Ib051de840dcd11e5b4bafa136b480ad2&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)) (Jackson, J., concurring).

…

The first principles in this area are firmly established. The Constitution allocates some foreign policy powers to the Executive, grants some to the Legislature, and enjoins the President to “take Care that the Laws be faithfully executed.”  The Executive may disregard “the expressed or implied will of Congress” only if the Constitution grants him a power “at once so conclusive and preclusive” as to “disabl[e] the Congress from acting upon the subject.” Youngstown, 343 U.S., at 637–638 (Jackson, J., concurring).

Assertions of exclusive and preclusive power leave the Executive “in the least favorable of possible constitutional postures,” and such claims have been “scrutinized with caution” throughout this Court's history. Id., at 640, 638. For our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs.

In this case, the President claims the exclusive and preclusive power to recognize foreign sovereigns. The Court devotes much of its analysis to accepting the Executive's contention.  I have serious doubts about that position. The majority places great weight on the Reception Clause, which directs that the Executive “shall receive Ambassadors and other public Ministers.”  But that provision, framed as an obligation rather than an authorization, appears alongside the duties imposed on the President by Article II, Section 3, not the powers granted to him by Article II, Section 2. Indeed, the People ratified the Constitution with Alexander Hamilton's assurance that executive reception of ambassadors “is more a matter of dignity than of authority” and “will be without consequence in the administration of the government.” The Federalist No. 69, p. 420 (C. Rossiter ed. 1961). …

The majority's other asserted textual bases are even more tenuous. The President does have power to make treaties and appoint ambassadors. But those authorities are shared with Congress,  so they hardly support an inference that the recognition power is exclusive.

Precedent and history lend no more weight to the Court's position…

As for history, the majority admits that it too points in both directions. Some Presidents have claimed an exclusive recognition power, but others have expressed uncertainty about whether such preclusive authority exists. Those in the skeptical camp include Andrew Jackson and Abraham Lincoln, leaders not generally known for their cramped conceptions of Presidential power. Congress has also asserted its authority over recognition determinations at numerous points in history. The majority therefore falls short of demonstrating that “Congress has accepted” the President's exclusive recognition power. In any event, we have held that congressional acquiescence is only “pertinent” when the President acts in the absence of express congressional authorization, not when he asserts power to disregard a statute, as the Executive does here.

In sum, although the President has authority over recognition, I am not convinced that the Constitution provides the “conclusive and preclusive” power required to justify defiance of an express legislative mandate. …

But even if the President does have exclusive recognition power, he still cannot prevail in this case, because the statute at issue does not implicate recognition. The relevant provision, § 214(d), simply gives an American citizen born in Jerusalem the option to designate his place of birth as Israel “[f]or purposes of” passports and other documents. …

…

Ultimately, the only power that could support the President's position is the one the majority purports to reject: the “exclusive authority to conduct diplomatic relations.” The Government offers a single citation for this allegedly exclusive power: United States v. Curtiss–Wright Export Corp., 299 U.S. 304, 319–320 (1936). But as the majority rightly acknowledges, Curtiss–Wright did not involve a claim that the Executive could contravene a statute; it held only that he could act pursuant to a legislative delegation.

The expansive language in Curtiss–Wright casting the President as the “sole organ” of the Nation in foreign affairs certainly has attraction for members of the Executive Branch. The Solicitor General invokes the case no fewer than ten times in his brief. But our precedents have never accepted such a sweeping understanding of executive power. …

Resolving the status of Jerusalem may be vexing, but resolving this case is not. Whatever recognition power the President may have, exclusive or otherwise, is not implicated by § 214(d). It has not been necessary over the past 225 years to definitively resolve a dispute between Congress and the President over the recognition power. Perhaps we could have waited another 225 years. But instead the majority strains to reach the question based on the mere possibility that observers overseas might misperceive the significance of the birthplace designation at issue in this case. And in the process, the Court takes the perilous step—for the first time in our history—of allowing the President to defy an Act of Congress in the field of foreign affairs. …

**Justice SCALIA, with whom THE CHIEF JUSTICE and Justice ALITO join, dissenting.**

Before this country declared independence, the law of England entrusted the King with the exclusive care of his kingdom's foreign affairs. The royal prerogative included the “sole power of sending ambassadors to foreign states, and receiving them at home,” the sole authority to “make treaties, leagues, and alliances with foreign states and princes,” “the sole prerogative of making war and peace,” and the “sole power of raising and regulating fleets and armies.” 1 W. Blackstone, Commentaries \*253, \*257, \*262. The People of the United States had other ideas when they organized our Government. They considered a sound structure of balanced powers essential to the preservation of just government, and international relations formed no exception to that principle.

The People therefore adopted a Constitution that divides responsibility for the Nation's foreign concerns between the legislative and executive departments. The Constitution gave the President the “executive Power,” authority to send and responsibility to receive ambassadors, power to make treaties, and command of the Army and Navy—though they qualified some of these powers by requiring consent of the Senate. Art. II, §§ 1–3. At the same time, they gave Congress powers over war, foreign commerce, naturalization, and more. Art. I, § 8. …

This case arises out of a dispute between the Executive and Legislative Branches about whether the United States should treat Jerusalem as a part of Israel. The Constitution contemplates that the political branches will make policy about the territorial claims of foreign nations the same way they make policy about other international matters: The President will exercise his powers on the basis of his views, Congress its powers on the basis of its views. That is just what has happened here. … [extensive further discussion is omitted.]