Note on Allocation of Constitutional Authority over Foreign Affairs

Supreme Court guidance on which branch controls U.S. foreign policy

When Israel declared independence in 1948, President Harry S. Truman immediately recognized the new state. For decades thereafter, however, the United States' policy was to recognize no state as having sovereignty over Jerusalem, and that the status of Jerusalem was an issue to be decided by negotiations between the relevant parties. Thus, the United States did not officially recognize Israeli or Palestinian claims to sovereignty in Jerusalem. During this time, a State Department manual instructed passport officials to record "Jerusalem" as the place of birth in the passports of United States citizens born in that city.

In 2002, Congress passed and the President signed the Foreign Relations Authorization Act, Fiscal Year 2003. Section 214 of that Act, entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," contains various provisions relating to Jerusalem. Section 214(d) provides in relevant part that the Secretary of State, upon the request of an American citizen born in Jerusalem or that citizen's parents, shall "record the place of birth as Israel" on that person's passport. When signing the bill into law, President George W. Bush stated his belief that this section "impermissibly interfere[s] with the President's constitutional authority to … speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states."

In 2002, Menachem Zivotofsky was born to U.S. citizens living in Jerusalem. Zivotofsky's parents requested that his place of birth be listed as "Israel" on his passport. The State Department refused, and Zivotofsky's passport listed his place of birth as "Jerusalem." Zivotofsky's parents filed a complaint against the Secretary of State. This dispute's first visit to the Supreme Court resulted in an opinion holding that the political question doctrine did not bar consideration of Zivotofsky's claims, and the case was remanded for a determination on the merits. *Zivotofsky v. Clinton*, 566 U.S. 189 (2012). On remand, the D.C. Circuit found the statute to be an unconstitutional interference with the President's foreign affairs powers, *Zivotofsky v. Sec. of State*, 725 F.3d 197 (D.C. Cir. 2013), and the Supreme Court again granted certiorari. In June 2015, the Court held that the statute unconstitutionally interferes with the President's exclusive power to grant formal recognition to foreign sovereigns. The full opinion can be found here; an edited version follows.

SUPREME COURT OF THE UNITED STATES

No. 13-628

MENACHEM BINYAMIN ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS, ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY, PETITIONER

v.

JOHN KERRY, SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 8, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

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." *Youngstown*, 343 U.S., at 637. 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. *Id.*, at 638.

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, Comment a, p. 84 (1986). It may also involve the determination of a state's

territorial bounds… Recognition is often effected by an express "written or oral declaration."… It may also be implied for example, by concluding a bilateral treaty or by sending or receiving diplomatic agents…

Legal consequences follow formal recognition. Recognized sovereigns may sue in United States courts, and may benefit from sovereign immunity when they are sued. The actions of a recognized sovereign committed within its own territory also receive deference in domestic courts under the act of state doctrine. Recognition at international law furthermore, is a precondition of regular diplomatic relations…Recognition is thus "useful, even necessary," to the existence of a state…

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…

At the time of the founding … 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) ("[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"). 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. See A. Hamilton, Pacificus No. 1, in The Letters of Pacificus and Helvidius 5, 13-14 (1845) (President "acknowledged the republic of France, by the reception of its minister")....

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." *Ibid.*

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. The President has the sole power to negotiate treaties, see *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 319 (1936), and the Senate may not conclude or ratify a treaty without Presidential action. The President, too, nominates the Nation's ambassadors and dispatches other diplomatic agents. Congress may not send an ambassador without his involvement. Beyond that, the President himself has the power to open diplomatic channels simply by engaging in

direct diplomacy with foreign heads of state and their ministers. The Constitution thus assigns the President means to effect recognition on his own initiative. Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation…

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." *American Ins. Assn. v. Garamendi*, 539 U. S. 396, 424 (2003) (quoting *Crosby v. National Foreign Trade Council*, 530 U. S. 363, 381 (2000)). 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….

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. 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.

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.

In practice, then, the President's recognition determination is just one part of a political process that may require Congress to make laws. The President's exclusive recognition power encompasses the authority to acknowledge, in a formal sense, the legitimacy of other states and governments, including their territorial bounds. Albeit limited, the exclusive recognition power is essential to the conduct of Presidential duties. The formal act of recognition is an executive power that Congress may not qualify. If the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question. A clear rule that the formal power to recognize a foreign government subsists in the President therefore serves a necessary purpose in diplomatic relations. . . .

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…In the end, however, a fair reading of the cases shows that the President's role in the recognition process is both central and exclusive…

The Secretary … contends that under the Court's precedent the President has "exclusive authority to conduct diplomatic relations," along with "the bulk of foreign-affairs powers." In support of his submission that the President has broad, undefined powers over foreign affairs, the Secretary quotes *United States v. Curtiss- Wright Export Corp.*, which described the President as "the sole organ of the federal government in the field of international relations." 299 U. S., at 320. This Court declines to acknowledge that unbounded power. A formulation broader than the rule that the President alone determines what nations to formally recognize as legitimate – and that he consequently controls his statements on matters of recognition – presents different issues and is unnecessary to the resolution of this case.

The *Curtiss-Wright* case does not extend so far as the Secretary suggests. In *Curtiss-Wright*, the Court considered whether a congressional delegation of power to the President was constitutional. Congress had passed a joint resolution giving the President the discretion to prohibit arms sales to certain militant powers in South America. The resolution provided criminal penalties for violation of those orders. The Court held that the delegation was constitutional, reasoning that Congress may grant the President substantial authority and discretion in the field of foreign affairs. Describing why such broad delegation may be appropriate, the opinion stated:

> "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole

> organ of the nation in its external relations, and its sole representative with foreign nations.' [10 Annals of Cong.] 613." *Id.*, at 319.

This description of the President's exclusive power was not necessary to the holding of Curtiss- Wright-which, after all, dealt with congressionally authorized action, not a unilateral Presidential determination. Indeed, *Curtiss-Wright* did not hold that the President is free from Congress' lawmaking power in the field of international relations. The President does have a unique role in communicating with foreign governments . . . . But whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law.

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. See, e.g., *Medellin v. Texas*, 552 U. S. 491, 523-532 (2008)… cf. *Dames & Moore v. Regan*, 453 U. S. 654, 680-681 (1981). 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….

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…

…§214(d) requires the President, through the Secretary, to identify citizens born in Jerusalem who so request as being born in Israel. But according to the President, those citizens were not born in Israel. As a matter of United States policy, neither Israel nor any other country is acknowledged as having sovereignty over Jerusalem. In this way, §214(d) "directly contradicts" the "carefully calibrated and longstanding Executive branch policy of neutrality toward 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."

1 Oppenheim's International Law §50, at 169. 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." 343 U. S., at 637-638 (concurring opinion). 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 . . . . 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. That congressional command would not only prevent the Nation from speaking with one voice but also prevent the Executive itself from doing so in conducting foreign relations.

Although the statement required by §214(d) would not itself constitute a formal act of recognition, it is a mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State…As a result, it is unconstitutional. This is all the more clear in light of the longstanding treatment of a passport's place-of-birth section as an official executive statement implicating recognition…

The flaw in §214(d) is further underscored by the undoubted fact that that the purpose of the statute was to infringe on the recognition power-a power the Court now holds is the sole prerogative of the President. The statute is titled "United States Policy with Respect to Jerusalem as the Capital of Israel." §214, 116 Stat. 1365. 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.

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*, 343 U. S. 579, 637-638 (1952) (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." Art. II, §3. 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. See *Medellin v. Texas*, 552 U.S. 491, 524-532 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 590-595, 613-625 (2006); *Youngstown*, 343 U. S., at 587-589 (majority opinion).

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. . . . The majority places great weight on the Reception Clause, which directs that the Executive "shall receive Ambassadors and other public Ministers." Art. II, §3. 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. Art. II, §2. But those authorities are *shared* with Congress, *ibid.*, so they hardly support an inference that the recognition power is *exclusive*….

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. *Medellin*, 552 U. S., at 528; see *Dames & Moore*, 453 U. S., at 678-679.

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. *Youngstown*, 343 U. S., at 638 (Jackson, J., concurring). As the leading scholar on this issue has concluded, the "text, original understanding, post-ratification history, and structure of the Constitution do not support the ... expansive claim that this executive power is

plenary." Reinstein, Is the President's Recognition Power Exclusive? 86 Temp. L. Rev. 1, 60 (2013).

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. Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1366. The State Department itself has explained that "identification" -not recognition-"is the principal reason that U.S. passports require 'place of birth.'" Congress has not disputed the Executive's assurances that §214(d) does not alter the longstanding United States position on Jerusalem. And the annals of diplomatic history record no examples of official recognition accomplished via optional passport designation.

The majority acknowledges both that the "Executive's exclusive power extends no further than his formal recognition determination" and that §214(d) does "not itself constitute a formal act of recognition." Taken together, these statements come close to a confession of error. The majority attempts to reconcile its position by reconceiving §214(d) as a "mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State." But as just noted, neither Congress nor the Executive Branch regards §214(d) as a recognition determination, so it is hard to see how the statute could contradict any such determination.

At most, the majority worries that there may be a perceived contradiction based on a mistaken understanding of the effect of §214(d), insisting that some "observers interpreted §214 as altering United States policy regarding Jerusalem." To afford controlling weight to such impressions, however, is essentially to subject a duly enacted statute to an international heckler's veto. . . .

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. See *Hamdan*, 548 U.S., at 591-592; *Dames & Moore*, 453 U.S., at 661-662; *Youngstown*, 343 U.S., at 587 (majority opinion); *id.*, at 635, n. 2 (Jackson, J., concurring).

Just a few Terms ago, this Court rejected the President's argument that a broad foreign relations power allowed him to override a state court decision that contradicted U.S. international law obligations. *Medellin*, 552 U. S., at 523-532. If the President's so-called general foreign relations authority does not permit him to countermand a

State's lawful action, it surely does not authorize him to disregard an express statutory directive enacted by Congress, which-unlike the States-has extensive foreign relations powers of its own. Unfortunately, despite its protest to the contrary, the majority today allows the Executive to do just that.

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.

I respectfully dissent.

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

II

The Court frames this case as a debate about recognition. Recognition is a sovereign's official acceptance of a status under international law. A sovereign might recognize a foreign entity as a state, a regime as the other state's government, a place as part of the other state's territory, rebel forces in the other state as a belligerent power, and so on. 2 M. Whiteman, Digest of International Law § 1 (1963) (hereinafter Whiteman). President Truman recognized Israel as a state in 1948, but Presidents have consistently declined to recognize Jerusalem as a part of Israel's (or any other state's) sovereign territory…

Recognition is more than an announcement of a policy. Like the ratification of an international agreement or the termination of a treaty, it is a formal legal act with effects under international law. It signifies acceptance of an international status, and it makes a commitment to continued acceptance of that status and respect for any attendant rights. In order to extend recognition, a state must perform an act that unequivocally manifests that intention. Whiteman §3. That act can consist of an express conferral of recognition, or one of a handful of acts that by international custom imply recognition – chiefly, entering into a bilateral treaty, and sending or receiving an ambassador. *Ibid*.

To know all this is to realize at once that §214(d) has nothing to do with recognition. Section 214(d) does not require the Secretary to make a formal declaration about Israel's sovereignty over Jerusalem. And nobody suggests that international custom infers acceptance of sovereignty from the birthplace designation on a passport or birth report, as it does from bilateral treaties or exchanges of ambassadors. Recognition would preclude the United States (as a matter of international law) from later contesting Israeli sovereignty over Jerusalem. But making a notation in a passport or birth report does not encumber the Republic with any international obligations. It

leaves the Nation free (so far as international law is concerned) to change its mind in the future. That would be true even if the statute required *all* passports to list "Israel." But in fact it requires only those passports to list "Israel" for which the citizen (or his guardian) *requests* "Israel"; all the rest, under the Secretary's policy, list "Jerusalem." It is utterly impossible for this deference to private requests to constitute an act that unequivocally manifests an intention to grant recognition.

Section 214(d) performs a more prosaic function than extending recognition. Just as foreign countries care about what our Government has to say about their borders, so too American citizens often care about what our Government has to say about their identities. The State Department does not grant or deny recognition in order to accommodate these individuals, but it does make exceptions to its rules about how it records birthplaces. Although normal protocol requires specifying the bearer's country of birth in his passport, Dept. of State, 7 Foreign Affairs Manual (FAM) §1300, App. D, §1330(a) (2014), the State Department will, if the bearer protests, specify the city of birth instead-so that an Irish nationalist may have his birthplace recorded as "Belfast" rather than "United Kingdom," *id*., §1380(a). And although normal protocol requires specifying the country with *present* sovereignty over the bearer's place of birth, *id.*, § 1330(b), a special exception allows a bearer born before 1948 in what was then Palestine to have his birthplace listed as "Palestine," *id.*, § 1360(g). Section 214(d) requires the State Department to make a further accommodation. Even though the Department normally refuses to specify a country that lacks recognized sovereignty over the bearer's birthplace, it must suspend that policy upon the request of an American citizen born in Jerusalem. 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.

The best indication that §214(d) does not concern recognition comes from the State Department's policies concerning Taiwan. According to the Solicitor General, the United States "acknowledges the Chinese position" that Taiwan is a part of China, but "does not take a position" of its own on that issue. Brief for Respondent 51-52. Even so, the State Department has for a long time recorded the birthplace of a citizen born in Taiwan as "China." It indeed *insisted* on doing so until Congress passed a law (on which §214(d) was modeled) giving citizens the option to have their birthplaces recorded as "Taiwan." See § 132, 108 Stat. 395, as amended by §1(r), 108 Stat. 4302. The Solicitor General explains that the designation "China" "involves a geographic description, not an assertion that Taiwan is ... part of sovereign China." Brief for Respondent 51-52. Quite so. Section 214(d) likewise calls for nothing beyond a "geographic description"; it does not require the Executive even to assert, never mind formally recognize, that Jerusalem is a part of sovereign Israel. Since birthplace specifications in citizenship documents are matters within Congress's control, Congress may treat Jerusalem as a part of Israel when regulating the recording of birthplaces, even if the President does not do so when extending recognition. Section 214(d), by the way, expressly directs the Secretary to "record the place of birth as Israel" "*[f]or purposes of* the registration of birth, certification of nationality, or issuance of a passport." … Finding recognition in this provision is rather like finding

admission to the Union in a provision that treats American Samoa as a State for purposes of a federal highway safety program, 23 U.S. C. §401.

…

In the end, the Court's decision does not rest on text or history or precedent. It instead comes down to "functional considerations"-principally the Court's perception that the Nation "must speak with one voice" about the status of Jerusalem. The vices of this mode of analysis go beyond mere lack of footing in the Constitution. Functionalism of the sort the Court practices today will systematically favor the unitary President over the plural Congress in disputes involving foreign affairs. It is possible that this approach will make for more effective foreign policy, perhaps as effective as that of a monarchy. It is certain that, in the long run, it will erode the structure of separated powers that the People established for the protection of their liberty.

_____

Notes and Questions

1. The Court does not accept the State Department's claim that the President has "exclusive authority to conduct diplomatic relations," and emphasizes that its holding is limited to the recognition power. Yet does the majority's analysis suggest that the President possesses other exclusive powers in the diplomatic realm? Does the opinion support the Executive Branch's claim that it has "exclusive constitutional authority to determine the time, scope, and objectives of international negotiations"? Can Congress determine what positions the U.S. should advance, or how it should vote, in international organizations, or should these fall within the exclusive authority of the Executive Branch?

2. U.S. policy regarding Jerusalem has shifted since the Zivotofsky decision. In December 2017, President Trump announced that the U.S. officially recognized Jerusalem as Israel's capital and directed the State Department to move the U.S. Embassy from Tel Aviv to Jerusalem. The new embassy opened on May 14, 2018.