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EXPANDING TERRITORIAL BOUNDS: THE RECOGNITION DOCTRINE AFTER *ZIVOTOFSKY v. KERRY*

*Nicole Kirkilevich**

I. INTRODUCTION

In *Zivotofsky ex rel. Zivotofsky v. Kerry*,¹ the Supreme Court for the first time “accepted a [p]resident’s direct defiance of an Act of Congress in the field of foreign affairs.”² *Zivotofsky* examined the constitutional question of whether recognition power is shared between the political branches or whether it resides exclusively with one political branch. The Court answered this question by ruling that the president has the formal and exclusive power to decide what foreign nations the United States will recognize in nation-to-nation dealings.³ Curiously, although the Court allocated the power of recognition to the president, the statute at issue, section 214(d) of the Federal Relations Act,⁴ does not implicate recognition. As a result, the Court extended executive power beyond its already expansive authority.

Part II of this Comment discusses the factual background and procedural history of *Zivotofsky*. Part III analyzes the Supreme Court’s interpretation of the president’s exclusive power to control recognition determinations and its effect on the validity of section 214(d). Part IV presents the ramifications of the majority’s reasoning in *Zivotofsky* by expanding the president’s already robust foreign affairs power. Part V concludes that the Court had no authority to

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1. (*Zivotofsky VIII*), 135 S. Ct. 2076 (2015).

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

3. Lyle Denniston, *Opinion Analysis: Walking on a Tightrope on Mideast Policy*, SCOTUSBLOG (June 8, 2015, 1:32 PM), <http://www.scotusblog.com/2015/06/opinion-analysis-walking-on-a-tightrope-on-mideast-policy/>.

4. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107–228, § 214(d), 116 Stat. 1350 (2002).

answer this political question and that even if it did, the Court should not have considered recognition in its analysis.

II. STATEMENT OF THE CASE

In 2002, petitioner Menachem Binyamin Zivotofsky was born in Jerusalem to United States citizens.⁵ In December 2002, Zivotofsky's mother visited the American Embassy in Tel Aviv.⁶ There, she requested a passport with the place of birth listed as "Jerusalem, Israel."⁷ Pursuant to State Department policy, the Embassy explained that the passport would list "Jerusalem" only.⁸ Zivotofsky's parents, as his guardians, brought suit on his behalf in the United States District Court for the District of Columbia, seeking to enforce section 214(d) of the Foreign Relations Authorization Act.⁹

Section 214(d), titled Record of Place of Birth As Israel for Passport Purposes, reads: "For 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."¹⁰

In his suit, Zivotofsky challenged the secretary of state's failure to implement section 214(d), which requires the Department of State to list an individual's place of birth as "Jerusalem, Israel" rather than "Jerusalem."¹¹ The court granted the defendant's motion to dismiss the case, reasoning that Zivotofsky lacked standing because he suffered no injury-in-fact.¹² Further, the court found that "the issue before the Court is a nonjusticiable political question and that the Court therefore lacks jurisdiction."¹³

The Court of Appeals for the District of Columbia reversed on the standing issue.¹⁴ It then addressed a different political question

5. *Zivotofsky VIII*, 135 S. Ct. at 2083.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*; see *Zivotofsky ex rel. Zivotofsky v. Sec'y of State (Zivotofsky I)*, No. CIV.A.03-1921, 2004 WL 5835212, at *2 (D.D.C. Sept. 7, 2004).

10. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366.

11. *Zivotofsky I*, 2004 WL 5835212, at *2.

12. *Id.* at *3.

13. *Id.* at *4.

14. *Zivotofsky ex rel. Ari Z. v. Sec'y of State (Zivotofsky II)*, 444 F.3d 614, 619 (D.C. Cir. 2006) (holding that that child suffered injury in fact as required for standing because "a concrete

regarding the meaning of section 214(d): whether section 214(d) entitles Zivotofsky to have just “Israel” listed as his place of birth on his passport and on his Consular Birth Report.¹⁵

On remand, the district court applied the six factors set forth in *Baker v. Carr*,¹⁶ which dictate when an issue is a nonjusticiable political question.¹⁷ The court noted that the “presence of any one factor indicates that the case presents a non-justiciable political question.”¹⁸ These factors include:

[1] [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁹

The court determined that the first, second, fourth, and sixth factors were present.²⁰ It found that the first factor was present because “resolving [the plaintiff’s] claim on the merits would necessarily require the court to decide the political status of Jerusalem. The case law makes clear that the Constitution commits that decision to the executive branch.”²¹ The court held that the second factor was present because “the political situation in the Middle East is enormously complex, volatile, and long-standing. Indeed, ‘it is hard to conceive of an issue more quintessentially political in nature than the ongoing Israeli-Palestinian conflict, which

and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by statute”).

15. *Id.* at 619.

16. 369 U.S. 186 (1962).

17. *Zivotofsky ex rel. Zivotofsky v. Sec’y of State (Zivotofsky III)*, 511 F. Supp. 2d 97, 102 (D.D.C. 2007).

18. *Id.*

19. *Id.*

20. *Id.* at 103–106. The court did not analyze the third or fifth factors. *See id.*

21. *Id.* at 103.

has raged on the world stage with devastation on both sides for decades.”²²

The fourth factor was present because the court determined that a decision on the merits “would risk offending either, or both, the legislative and executive branches, which are at loggerheads over United States policy regarding Jerusalem. Such conflicts are best resolved through political means, by the two political branches themselves.”²³ Finally, the court found that the sixth factor was present, stating that if the court inserted its voice on the subject of Jerusalem’s status, “a controversial reaction is virtually guaranteed.”²⁴ Additionally, “such a reaction can only further complicate and undermine United States efforts to help resolve the Middle East conflict.”²⁵

Ultimately, the district court affirmed its prior ruling that it lacked subject matter over the suit and granted the defendant’s motion to dismiss for lack of subject matter jurisdiction, finding that the case at hand presented a nonjusticiable political question.²⁶ The plaintiff appealed.

The Court of Appeals for the District of Columbia once again held that, since the judiciary had no authority “to order the Executive Branch to change the nation’s foreign policy in this matter,” this case was nonjusticiable under the political question doctrine.²⁷ Subsequently, Zivotofsky filed a petition for writ of certiorari. The Supreme Court directed the parties to argue whether section 214 of the Foreign Relations Authorization Act, “impermissibly infringes the [p]resident’s power to recognize foreign sovereigns.”²⁸

In 2012, the United States Supreme Court determined that the question raised in *Zivotofsky* was not a political question because “[n]o policy underlying the political question doctrine suggests that

22. *Id.* at 104 (citing *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 111–12 (D.D.C. 2005)).

23. *Id.* at 105.

24. *Id.* at 106.

25. *Id.*

26. *Id.* at 107.

27. *Zivotofsky v. Sec’y of State (Zivotofsky IV)*, 571 F.3d 1227, 1228 (D.D.C. 2004). The court stated:

It has been the longstanding policy of the United States to take no side in the contentious debate over whether Jerusalem is part of Israel. In this case, the federal courts are asked to direct the Secretary of State to contravene that policy and record in official documents that Israel is the birthplace of a U.S. citizen born in Jerusalem.

Id.

28. *M.B.Z. ex rel. Zivotofsky v. Clinton (Zivotofsky V)*, 131 S. Ct. 2897, 2897 (2011).

Congress or the Executive . . . can decide the constitutionality of a statute; that is a decision for the courts.”²⁹ In making this determination, the Court remanded the issue to the lower court for resolution of the claims that the lower court’s error prohibited the parties from addressing.³⁰

The case was remanded to the district court to decide whether “exclusive Executive Branch Power authorizes the Secretary to decline to enforce section 214(d).”³¹ The court held the president holds the exclusive power to determine whether to recognize a foreign sovereign.³² Additionally, it found that by enacting section 214(d), Congress intended to force the State Department to deviate from its position of neutrality on which, if any, nation or government is sovereign over Jerusalem.³³ As a result, the court concluded section 214(d) intrudes on the president’s recognition power and is therefore unconstitutional. Again, Zivotofsky sought Supreme Court review.³⁴

In 2015, the Supreme Court issued its final ruling. The Court affirmed the lower court’s determination that the president has the exclusive power to recognize foreign nations and governments and that section 214(d) infringes on that power.³⁵

III. REASONING OF THE COURT

The Court’s opinion in *Zivotofsky*, through an examination of the Constitution, case precedent, and history, decided the scope of recognition authority. The majority answered two questions: first, which political branch holds the power to grant formal recognition to a foreign sovereign, and second, whether section 214(d) of the Foreign Relations Act is constitutional. Yet throughout the majority’s analysis, the Court conceded that section 214(d) does not involve a question of recognition because the dispute at hand was not

29. *Zivotofsky ex rel. Zivotofsky v. Clinton (Zivotofsky VI)*, 132 S. Ct. 1421, 1428 (2012) (citing *INS v. Chadha*, 462 U.S. 919, 941–42 (1983)).

30. *Id.* at 1430.

31. *Zivotofsky ex rel. Zivotofsky v. Sec’y of State (Zivotofsky VII)*, 725 F.3d 197, 205 (D.C. Cir. 2013), *cert. granted sub nom. Zivotofsky ex rel. Zivotofsky v. Kerry*, 134 S. Ct. 1873 (2014), and *aff’d sub nom. Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky VIII)*, 135 S. Ct. 2076 (2015).

32. *Id.* at 214.

33. *Id.* at 220.

34. *Zivotofsky VIII*, 135 S. Ct. 2076 (2015).

35. *Id.*

about recognizing nation-states. Rather, the dispute was about the territory of a nation-state—whether Jerusalem is a part of Israel or whether it is its own stateless territory.

A. Exclusive Authority over Recognition Power

In deciding which branch has the “exclusive” authority to grant formal recognition, the Court referred to Justice Jackson’s tripartite framework from his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.³⁶ The Court focused on Justice Jackson’s third category: “when the [p]resident 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.”³⁷ In order to satisfy this category, the president’s asserted power must be “exclusive” and “conclusive” on the issue.³⁸ The Court found that in refusing to implement section 214(d), the president may rely only on the powers the Constitution grants to him alone.³⁹

Throughout its analysis, the Court looked not only at the text and structure of the Constitution, but also to precedent and historical practice. The Court focused on the notion that the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not.⁴⁰

1. The Constitution

In the text and structure of the Constitution, there is not one express clause that gives the president exclusive authority over foreign affairs.⁴¹ The Court examined a number of different executive powers granted by the Constitution to create a “logical and proper” inference that the president has the power to recognize nations. The Court focused on the president’s “recognition power,” defining it as a “‘formal acknowledgement’ that a particular ‘entity

36. 343 U.S. 579 (1952); *Zivotofsky VIII*, 135 S. Ct. at 2083.

37. *Zivotofsky VIII*, 135 S. Ct. at 2083–84.

38. *Id.* at 2084.

39. *Id.*

40. *Id.* at 2086 (“Foreign countries need to know before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received; their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights.”).

41. *Id.* at 2084 (“Despite the importance of the recognition power in foreign relations, the Constitution does not use the term ‘recognition,’ either in Article II or elsewhere.”).

possesses the qualifications for statehood' or 'that a particular regime is the effective government of a state.'"⁴²

First, the Court found that the Constitution's Reception Clause grants the president the power to recognize foreign nations and governments.⁴³ Article II, Section 3 states that the president shall have the authority to "receive ambassadors and other public ministers." The majority noted that "[a]t the time of the founding . . . prominent international scholars suggested that receiving an ambassador was tantamount to recognizing the sovereignty of the sending state."⁴⁴ Therefore, it concluded, as a "logical and proper" inference, that a clause that directs the president to receive and acknowledge ambassadors would be understood as giving the president the power to recognize nations.⁴⁵ However, Justice Roberts, in his dissent, noted that the provision, "framed as an obligation rather than an authorization," is alongside the duties imposed on the president by Article II, Section 3, not a power granted to him by Article II, Section 2.⁴⁶

Second, the Court inferred that the president was granted the power of recognition from other Article II powers, such as the power to make treaties and appoint ambassadors.⁴⁷ The majority briefly mentioned the president's treaty-making power,⁴⁸ stating that "recognition may occur on 'the conclusion of a bilateral treaty,' or the 'formal initiation of diplomatic relations,' including the dispatch of an ambassador."⁴⁹ Further it found that the president had the sole power to negotiate treaties, and that the Senate may not conclude or

42. *Zivotofsky VIII*, 135 S. Ct. at 2084 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. a (1987)).

43. *Id.* at 2085.

44. *Id.* (internal citations omitted).

45. *Id.*

46. *Id.* at 2113 (Roberts, C.J., dissenting) ("[T]he 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.'" (quoting another source)).

47. *Id.* at 2085 (majority opinion) (citing U.S. CONST. art. II, § 2, cl. 2 ("He shall have Power . . . to make Treaties . . . and he shall nominate, . . . , shall appoint Ambassadors, other public Ministers and Consuls, . . . but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the president alone, in the Courts of Law, or in the Heads of Departments.")).

48. *Id.* (internal citations omitted).

49. *Id.* at 2086 (quoting I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 93 (7th ed. 2008)).

ratify treaties without presidential action.⁵⁰ Thus, the Constitution assigned the president the power to effect recognition on his own discretion.⁵¹

The Court noted that the Constitution did not grant Congress the constitutional power to initiate diplomatic relations with a foreign nation. The Court concluded by stating that these specific constitutional provisions, including those giving the president the power to appoint ambassadors and make treaties, bestowed the power of recognition on the president alone.⁵²

2. Case Precedent

Next, the Court cited relevant cases to provide instruction on addressing recognition power between the courts and political branches.⁵³ The cases, however, did not provide instruction on addressing the division of recognition power between the president and Congress, which was at dispute here.⁵⁴

First, the Court examined a case involving a dispute over the status of the Falkland Islands in the mid-1800s.⁵⁵ The Court noted that when the executive branch of the government assumes a fact regarding the sovereignty of an island or country, it is conclusive on the judiciary.⁵⁶ Then, the Court fast-forwarded to the 1930s and 1940s to examine the issues surrounding President Roosevelt's recognition of the Soviet Government of Russia. The Court cited both *United States v. Belmont*⁵⁷ and *United States v. Pink*.⁵⁸ Neither case, however, considered the initial act of recognition. Rather both cases considered the validity of executive agreements. Still, the Court found that the language in both *Belmont* and *Pink* "[was] strong support for the conclusion that it is for the president alone to determine which foreign government are legitimate."⁵⁹

50. *Id.* (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936)).

51. *Id.*

52. *Id.*

53. *Id.* at 2088. In his dissent, Justice Roberts, acknowledging the president's power to make treaties and appoint ambassadors, contends that those powers are shared with Congress and therefore do not support an inference that the power of recognition is exclusive to the president. *Id.* at 2113–16 (Roberts, C.J., dissenting).

54. *Id.* at 2088 (majority opinion).

55. *Id.* (citations omitted).

56. *Id.* (citing *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 421 (1839)).

57. 301 U.S. 324 (1941).

58. 315 U.S. 203 (1942).

59. *Zivotofsky VIII*, 135 S. Ct. at 2089.

In this instance, the Court expanded the boundary of executive power over foreign relations beyond the scope of the precedent it cited. At first it “decline[d] to acknowledge that unbounded power.” Yet it concluded by stating that the cases it cited “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.”⁶⁰

3. Historical Background

Subsequently, the Court looked back to the founding of our nation and established that since then, the president has had unilateral authority to recognize new states.⁶¹ It noted that while some presidents have chosen to cooperate with Congress, Congress itself never exercised the power of recognition.⁶² Justice Thomas, in his concurring opinion, indicated that although the Constitution does specify a number of foreign affairs powers and divides them between the political branches, some foreign affairs powers exercised by the federal government are not specifically allocated to either political branch. But the president has engaged in conduct, such as the communicating with foreign ministers, issuing passports, and preventing sudden attacks, with the support of Congress since the earliest days of the Republic.⁶³

In its analysis, the Court considered times in which recognition power became relevant. First, the Court turned to the recognition debate that arose when France was torn by revolution in 1793. Then, Secretary of State Jefferson and President Washington, without consulting Congress, authorized the American ambassador to continue relations with the new regime.

Second, in 1818, when South American colonies rose against Spain, Speaker of the House Henry Clay announced he “intended moving the recognition of Buenos Ayres and possibly Chile.”⁶⁴ The proposed bill was defeated, in part because Congress agreed that

60. *Id.* at 2091; *see also id.* at 2090 (“This Court’s cases do not hold that the recognition power is shared.”).

61. *Id.* at 2091 (“From the first Administration forward, the [p]resident has claimed unilateral authority to recognize foreign sovereigns. For the most part, Congress has acquiesced in the Executive’s exercise of the recognition power.”).

62. *Id.* (citations omitted).

63. *Id.* at 2097 (citations omitted).

64. *Id.* at 2092 (citations omitted).

recognition power rested solely with the president.⁶⁵ It was not until the president decided to recognize the South American republics, that Congress passed a resolution to appropriate funds for missions to the independent nations on the American continent.⁶⁶

The Court referred to a number of other events that required a recognition determination. Events such as: President Jackson facing a recognition crisis in Texas in 1835 when Texas rebelled against Mexico and formed its own government; President Lincoln requesting support for his recognition of Liberia and Haiti; and, decades later, President McKinley compromising with Congress regarding the independence of Cuba without recognizing a new Cuban government.⁶⁷ The Court explained, “[f]or the next 80 years, presidents consistently recognized new states and governments without any serious opposition from, or activity in, Congress.”⁶⁸

In 1970, President Carter recognized the People’s Republic of China as the government of China—derecognizing the Republic of China, located in Taiwan.⁶⁹ Throughout the legislative process, “no one raised a serious question regarding the [p]resident’s exclusive authority to recognize the [Peoples’ Republic of China]—or to decline to grant formal recognition to Taiwan.”⁷⁰ In fact, Congress acknowledged the president’s recognition determination as a “completed, lawful act.”⁷¹

The Court found that historical evidence indicated Congress’ acknowledgement of the president’s exclusive power to recognize foreign states and governments. In most cases, “Congress has respected the Executive’s policies and positions as to formal recognition.”⁷²

B. Section 214(d)’s Infringement on Executive Power

In holding that the Constitution assigned the president the means to effect recognition on his own initiative, the Court then had to

65. *Id.* (citations omitted).

66. *Id.* (citations omitted).

67. *Id.* at 2092–93.

68. *Id.* at 2093 (citations omitted).

69. *Id.* (citations omitted).

70. *Id.* at 2094.

71. *Id.* (citations omitted).

72. *Id.* Justice Roberts, however, found that “[s]ome [p]residents have claimed an exclusive recognition powers, but others have expressed uncertainty about whether such preclusive authority exists.” *Id.* at 2114 (Roberts, C.J., dissenting).

determine whether section 214(d) infringed on the “[e]xecutive’s consistent decision to withhold recognition with respect to Jerusalem.”⁷³ “As a matter of United States policy, neither Israel nor any other country is acknowledged as having sovereignty over Jerusalem.”⁷⁴ Therefore, section 214(d) “‘directly contradicts’ the ‘carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem.’”⁷⁵

The Court held that the executive’s exclusive power extends no further than his formal recognition determination.⁷⁶ With that said, Congress is precluded from enacting a law that directly contradicts that recognition determination. Therefore, “[a]lthough the statement required by [section] 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.”⁷⁷

While the Court acknowledged Congress’s “substantial” authority over passports, “to allow Congress to control the [p]resident’s communication in the context of a formal recognition determination is to allow Congress to exercise that exclusive power itself.”⁷⁸ Consequently, the Court held section 214(d) was unconstitutional.⁷⁹

Section 214(d) was not a statute that implicated recognition power.⁸⁰ Justice Roberts referred to the State Department’s explanation that identification and not recognition was the principal reason that United States passports require the place of birth information.⁸¹ In fact, “Congress has not disputed the Executive’s assurances that [section] 214(d) does not alter the longstanding United States position on Jerusalem.”⁸² Therefore, neither Congress nor the president regards section 214(d) as a recognition

73. *Id.* at 2094 (citations omitted); *see also id.* at 2086 (“Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation.”).

74. *Id.* at 2094.

75. *Id.* (citing *Zivotofsky ex rel. Zivotofsky v. Sec’y of State (Zivotofsky VII)*, 725 F.3d 197, 216–17 (D.C. Cir. 2013)).

76. *Id.* at 2095.

77. *Id.* (citations omitted).

78. *Id.* at 2096 (Roberts, C.J., dissenting).

79. *Id.*

80. *Id.* at 2116.

81. *Id.* at 2114.

82. *Id.*

determination, “so it is hard to see how the statute could contradict any such determination.”⁸³

IV. ANALYSIS

The Court’s approach in *Zivotofsky* was a confusing attempt to stretch the president’s authority in the realm of foreign relations. This case is one that “present[ed] a political question inappropriate for judicial resolution.”⁸⁴ So, the Court inserted its voice on a question that should have been left for the legislative and executive branches to resolve, a question that had consistently gone unanswered, and could have remained unanswered, in order to determine the validity of a statute that requires no recognition authority anyway.

A. Defining a Political Question

A political question is an issue to be resolved and decision to be made by the political branches of government and not by the courts. It “is axiomatic in a system of constitutional government built on the separation of powers.”⁸⁵ Historically, who is sovereign is not a judicial, but a political question, “the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government.”⁸⁶ Since 1890, “[t]his principle has always been upheld by [the Supreme C]ourt, and has been affirmed under a great variety of circumstances.”⁸⁷

The United States District Court for the District of Columbia found that a “passport inscribed ‘Jerusalem, Israel,’ might signify to others that the United States recognized Israel’s sovereignty over Jerusalem. Yet ‘[p]olitical recognition is exclusively a function of the Executive.’ For this reason . . . the case presented a political question—that is, a claim of unlawfulness that was nonjusticiable.”⁸⁸

83. *Id.* at 2115.

84. *Id.* at 2096 (Breyer, J., dissenting) (citations omitted).

85. Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 597 (1976).

86. *Jones v. United States*, 137 U.S. 202, 212 (1890).

87. *Id.* (citations omitted).

88. *Zivotofsky ex rel. Ari Z. v. Sec’y of State (Zivotofsky II)*, 444 F.3d 614, 619 (D.C. Cir. 2006) (citations omitted); *see also* *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006) (“The instant case involves topics that serve as the quintessential sources of political questions: national security and foreign relations. ‘Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.’” (citations omitted)).

Nevertheless, the Supreme Court remained steadfast in concluding that the claim at hand was not a political question.⁸⁹ And so, it proceeded to analyze the constitutionality of section 214(d).

B. *The Unnecessary Recognition Discussion*

In answering its second inquiry, the Court considered the question of Jerusalem's sovereignty by determining if section 214(d) was constitutional through a recognition determination: a determination the Court itself agreed it did not have to make.⁹⁰

The Constitution gives the president the exclusive authority to recognize or not to recognize a foreign state or government, and to maintain or not to maintain diplomatic relations with a foreign government.⁹¹ Further, “[n]onrecognition of a foreign sovereign and nonrecognition of its decrees are . . . deemed to be as essential a part of the power confided by the Constitution to the Executive for the conduct of foreign affairs as recognition.”⁹²

1. Defining Israel

In *Zivotofsky*, the Court's dispute was not about recognizing Israel as a nation-state. Israel had been recognized by the United States since its declaration of independence in 1948.⁹³ Further, that the United States declined to acknowledge Israel's sovereignty over Jerusalem has not changed its recognition of Israel as a sovereign state.⁹⁴ Ultimately, whatever position the United States did take with respect to the question of Jerusalem would not affect the recognition of Israel.⁹⁵ The recognition question should have ended there.

89. See *supra* Part III.

90. *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky VIII)*, 135 S. Ct. 2076, 2095 (2015) (“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.”); see also *id.* at 2118 (Scalia, J., dissenting) (“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.”).

91. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 204 (AM. LAW INST. 1987).

92. *The Maret*, 145 F.2d 431, 442 (3d Cir. 1944).

93. *Constitutional Law—Separation of Powers—D.C. Circuit Holds That Recognition of Foreign Governments Is an Exclusive Executive Power—Zivotofsky v. Secretary of State*, 725 F.3d 197 (D.C. Cir. 2013), 127 HARV. L. REV. 2154, 2155 (2014).

94. *Zivotofsky VIII*, 135 S. Ct. at 2112 (Thomas, J., dissenting). In fact, even if the United States did acknowledge Israel's sovereignty over Jerusalem, it would not change its recognition of Israel as a sovereign state.

95. *Id.*

2. Stepping Beyond the Scope of the Recognition Doctrine

This case goes beyond the customary forms of recognition, such as the recognition of countries and governments.⁹⁶ Instead, this case relates to Israel's geographic scope:⁹⁷

In international practice, recognizing countries is quite different from making determinations about their borders. When a country is recognized, it is typically without any statement about its territorial scope. Indeed, new countries routinely come into the world with border disputes. The question is whether Congress gets to determine, when acting within its enumerated powers, which set of substantive law applies to the territory.⁹⁸

This dispute is about the status of Jerusalem, “one of the most contentious issues in recorded history.”⁹⁹ The United States has a firm and steady policy of neutrality about which nation, or nations, can claim Jerusalem.¹⁰⁰ Here, the Court believed that an official United States document—a passport that identified Jerusalem as in Israel—would undermine that long-standing policy.¹⁰¹

Justice Scalia, in his dissent, challenged the notion 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.”¹⁰² The majority found that doctrine of recognition would prevent the United States from later disputing Israeli sovereignty over Jerusalem. However, Justice Scalia urged the Court to find that merely making a notation in a passport does not burden the nation with any international

96. Eugene Kontorovich, *Symposium: Zivotofsky Was Not About Recognition by Congress or the President*, SCOTUSBLOG (June 9, 2015, 2:54 PM), <http://www.scotusblog.com/2015/06/symposium-zivotofsky-was-not-about-recognition-by-congress-or-the-President/>.

97. *Id.*

98. *Id.*

99. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State (Zivotofsky VII)*, 725 F.3d 197, 200 (D.C. Cir. 2013).

100. Lyle Denniston, *Argument Preview: Court Edges Close to the Mideast Cauldron*, SCOTUSBLOG (Nov. 1, 2014, 12:02 AM), <http://www.scotusblog.com/2014/11/argument-preview-court-edges-close-to-the-mideast-cauldron/>.

101. *Id.*; see also *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky VIII)*, 135 S. Ct. 2076, 2118 (2015) (Scalia, J., dissenting).

102. *Zivotofsky VIII*, 135 S. Ct. at 2118 (Scalia, J., dissenting).

obligations.¹⁰³ Instead, it left the nation free to change its position in the future.¹⁰⁴

Even so, section 214(d) did not require a recognition determination. The majority stressed the notion that the president had exclusive authority over recognition power because it feared that there is a small possibility “observers overseas might misperceive the significance of the birthplace destination at issue in this case.”¹⁰⁵ In fact, for the first time and because of that fear, the Court allowed the president to “defy an Act of Congress in the field of foreign affairs.”¹⁰⁶

C. Expanding the President’s Vast Foreign Affairs Power

The Court stretched its analysis of the president’s power of recognition beyond the limits of Article II. The Constitution creates an unmistakable separation of powers in the Federal Government.¹⁰⁷ Certain terms are defined, whereas others, like foreign affairs powers, are vague. With regard to foreign nations, the president is the constitutional representative of the United States.¹⁰⁸ The president “manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success.”¹⁰⁹ That does not give him the “exclusive power” to recognize a foreign nation or expand the territory of a foreign nation.¹¹⁰

In its analysis, the Court allocated the president more authority than just his own Constitutional powers minus any of those granted to Congress over a particular matter.¹¹¹ At the outset of the majority opinion, the Court required that the president’s claim be “scrutinized

103. *Id.* at 2119.

104. *Id.*

105. *Id.* at 2116 (Roberts, C.J., dissenting).

106. *Id.*

107. Zachary A. Kady, *Who Decides Where You’re Born?* *Zivotofsky v. Clinton and the Recognition of Foreign States*, 26 GEO. IMMIGR. L.J. 667, 672 (2012).

108. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936).

109. *Id.* (quoting another source).

110. *See Zivotofsky VIII*, 135 S. Ct. at 2096 (“This case is confined solely to the exclusive power of the [p]resident to control recognition determinations, including formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds.”).

111. *See id.* at 2084 (citations omitted) (quoting another source); *supra* Part III.

with caution.”¹¹² Further, the Court required the president to rely solely on the powers the Constitution grants to him alone.¹¹³ Nevertheless, the Court did not abide by its outline and did not limit its analysis to the constitutional text. Instead, the Court relied on a myriad of methodological considerations to infer that the power of recognition is “exclusive” to the president.¹¹⁴

For example, the Court referred to case precedent that touches on a different form of recognition than the case at hand.¹¹⁵ Further, the Court referred to a handful of events throughout history where the president, in conjunction with Congress, recognized nations rather than expanding territorial boundaries, as required here.¹¹⁶ As a result, *Zivotofsky* expanded the president’s already wide-ranging foreign affairs power—a power not expressly granted to the president in the Constitution.

Judicial precedent is not the only area of the law affected by the decision in *Zivotofsky*. Until this case, the “Executive branch never possessed a judicial precedent that embraced its many functional arguments for presidential primacy in a decision that holds that the president can disregard a foreign affairs statute.”¹¹⁷ Now it does. *Zivotofsky* gives executive branch lawyers “more powerful ammunition” than it had in deciding whether to ignore foreign relations statutes in contexts that do not reach the courts for review.¹¹⁸

Ultimately, while this question may not arise again for decades, “the world of implied executive powers in foreign affairs and perhaps elsewhere is very much with us, in both their concurrent and exclusive varieties.”¹¹⁹ Now, the president may decide to fight Congress on matters such as his authority to negotiate trade agreements without exercising his constitutional veto; or, he may

112. *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952)).

113. *Id.*

114. *See supra* Part III.A.

115. *See supra* Part III.A.2.

116. *See supra* Part III.A.3.

117. Jack Goldsmith, *Why Zivotofsky Is a Significant Victory for the Executive Branch*, LAWFARE (June 8, 2015, 3:44 PM), <https://www.lawfareblog.com/why-zivotofsky-significant-victory-executive-branch>.

118. *Id.*

119. Alan Morrison, *Symposium: President Wins in Zivotofsky: Will There Be Another Battle?*, SCOTUSBLOG (June 9, 2015, 3:39 PM), <http://www.scotusblog.com/2015/06/symposium-president-wins-in-zivotofsky-will-there-be-another-battle/>.

announce that he has recognized a government, with no apprehension about an effort of Congress to override him.¹²⁰ On the other hand, “Congress might decide to up the ante by following Justice Kennedy and using the power of the purse, especially as part of a bill that the president must sign to keep the government from shutting down.”¹²¹ In the long run, this decision may “erode the structure of separated powers that the People established for the protection of their liberty.”¹²²

V. CONCLUSION

The Court, in its decision, expanded both its authority over political questions and the president’s authority over foreign affairs. The question at hand should have been left to the legislative and executive branches to decide. The Court should not have inserted itself into a recognition analysis in a situation that does not require recognition. The Court’s attempt to determine the constitutionality of section 214(d) ultimately granted the president abundant power over foreign affairs that may have lasting effects on the nation’s structure of separated powers.

120. *Id.*

121. *Id.*

122. *Id.*

