# *ZIVOTOFSKY v. KERRY*[1]

**576 U. S. ____ (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. [...]

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 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." Dept. of State, 7 Foreign Affairs Manual (FAM) §1383.4 (1987). 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, 116Stat. 1350. Section 214 of the Act is titled "United States Policy with Respect to Jerusalem as the Capital of Israel." *Id.*, at 1365. 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." *Id.*, at 1366.

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. App. 24–25. 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. *Id.,* at 25. She asked that his place of birth be listed as " 'Jerusalem, Israel.' " *Ibid.* The Embassy clerks explained that, pursuant to State Department policy, the passport would list only "Jerusalem." *Ibid.* Zivotofsky's parents objected and, as his guardians, brought suit on his behalf in the United States District Court for the District of Columbia, seeking to enforce §214(d).

[1] Note: this majority opinion has been edited from the original text by Travis Braidwood for classroom use. The full case text can be found here: < http://www.supremecourt.gov/opinions/14pdf/13-628_3dq3.pdf >

Pursuant to §214(d), Zivotofsky claims the right to have "Israel" recorded as his place of birth in his passport. [...]

This Court granted certiorari, vacated the judgment, and remanded the case. Whether §214(d) is constitutional, the Court held, is not a question reserved for the political branches. In reference to Zivotofsky's claim the Court observed "the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional"—not whether Jerusalem is, in fact, part of Israel. *Zivotofsky* v. *Clinton*, *supra*, at___ (slip op., at 7).

On remand the Court of Appeals held the statute unconstitutional. It determined that "the President exclusively holds the power to determine whether to recognize a foreign sovereign," 725 F. 3d, at 214, and that "section 214(d) directly contradicts a carefully considered exercise of the Executive branch's recognition power." *Id.*, at 217. […] This Court again granted certiorari. 572 U. S. ___ (2014).

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 –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." *Id.*, at 635. 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. *Id.*, at 637. 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." *Ibid.* To succeed in this third category, the President's asserted power must be both "exclusive" and "conclusive" on the issue. *Id.,* at 637–638.

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.

To determine whether the President possesses the exclusive power of recognition the Court examines the Constitution's text and structure, as well as precedent and history bearing on the question.

A

Recognition is a "formal acknowledgment" that a particular "entity possesses the qualifications for statehood" or "that a particular regime is the effective government 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. 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[.]

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. [...]

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. […] 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." *Ibid.* [...]

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. Brownlie 93; see also 1 Moore §27, at 73. 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. Because these specific Clauses confer the recognition power on the President, the Court need not consider whether or to what extent the Vesting Clause, which provides that the "executive Power" shall be vested in the President, provides further support for the President's action here. Art. II, §1, cl. 1.

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. […]

In light of this authority all six judges who considered this case in the Court of Appeals agreed that the President holds the exclusive recognition power. [...]

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. [...]

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. [...]

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. [...]

[D]uring the 1930's and 1940's, the Court addressed issues surrounding President Roosevelt's decision to recognize the Soviet Government of Russia. In *United States* v. *Belmont,* 301 U. S. 324 (1937) , and *Pink*, 315 U. S. 203 , New York state courts declined to give full effect to the terms of executive agreements the President had concluded in negotiations over recognition of the Soviet regime. In particular the state courts, based on New York public policy, did not treat assets that had been seized by the Soviet Government as property of Russia and declined to turn those assets over to the United States. The Court stated that it "may not be doubted" that "recognition, establishment of diplomatic relations, . . . and agreements with respect thereto" are "within the competence of the President." *Belmont*, 301 U. S., at 330. In these matters, "the Executive ha[s] authority to speak as the sole organ of th[e] government."*Ibid.* The Court added that the President's authority "is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition." *Pink*, *supra*, at 229; see also *Guaranty Trust Co.*, 304 U. S., at 137–138[.] Thus, New York state courts were required to respect the executive agreements. [...]

The President's determination in those cases did not contradict an Act of Congress. And the primary issue was whether the executive agreements could supersede state law. Still, the language in *Pink* and *Belmont*, which confirms the President's competence to determine questions of recognition, is strong support for the conclusion that it is for the President alone to determine which foreign governments are legitimate.

*Banco Nacional de Cuba* contains even stronger statements regarding the President's authority over recognition. There, the status of Cuba's Government and its acts as a sovereign were at issue. As the Court explained, "Political recognition is exclusively a function of the Executive." 376 U. S., at 410. Because the Executive had recognized the Cuban Government, the Court held that it should be treated as sovereign and could benefit from the "act of state" doctrine. See also *Baker* v. *Carr*, 369 U. S. 186, 213 (1962) [...]. As these cases illustrate, the Court has long considered recognition to be the exclusive prerogative of the Executive.

The Secretary now urges the Court to define the executive power over foreign relations in even broader terms. He contends that under the Court's precedent the President has "exclusive authority to conduct diplomatic relations," along with "the bulk of foreign-affairs powers." Brief for Respondent 18, 16. 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. *Id.,* at 311–312. 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. *Id.,* at 315–329. 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.'[.]

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. […] But whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law. […] 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. This Court's cases do not hold that the recognition power is shared. *Jones* v. *United States*, 137 U. S. 202 (1890) , and *Boumediene* v. *Bush*, 553 U. S. 723 (2008) , each addressed the status of territories controlled or acquired by the United States—not whether a province ought to be recognized as part of a foreign country. See also *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, 380 (1948) […]. Other cases describing a shared power address the recognition of Indian tribes—which is, similarly, a distinct issue from the recognition of foreign countries. See *Cherokee Nation* v. *Georgia*, 5 Pet. 1 (1831).

C

Having examined the Constitution's text and this Court's precedent, it is appropriate to turn to accepted understandings and practice. In separation-of-powers cases this Court has often "put significant weight upon historical practice." *NLRB* v. *Noel Canning*, 573 U. S. ___, ___ (2014) (slip op., at 6) (emphasis deleted). Here, history is not all on one side, but on balance it provides strong support for the conclusion that the recognition power is the President's alone. [...]

From the first Administration forward, the President has claimed unilateral authority to recognize foreign sovereigns. For the most part, Congress has acquiesced in the Executive's exercise of the recognition power. On occasion, the President has chosen, as may often be prudent, to consult and coordinate with Congress. As Judge Tatel noted in this case, however, "the most striking thing" about the history of recognition "is what is absent from it: a situation like this one," where Congress has enacted a statute contrary to the President's formal and considered statement concerning recognition. 725 F. 3d, at 221 (concurring opinion).

The first debate over the recognition power arose in 1793, after France had been torn by revolution. [...] 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[.] 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 recognition power again became relevant when yet another revolution took place—this time, in South America, as several colonies rose against Spain. In 1818, Speaker of the House Henry Clay announced he "intended moving the recognition of Buenos Ayres and probably of Chile." Goebel 121. Clay thus sought to appropriate money " '[f ]or one year's salary' " for " 'a Minister' " to present-day Argentina. 32 Annals of Cong. 1500 (1818). President Monroe, however, did not share that view. Although Clay gave "one of the most remarkable speeches of his career," his proposed bill was defeated. Goebel 123; 32 Annals of Cong. 1655. That action has been attributed, in part, to the fact that Congress agreed the recognition power rested solely with the President. [...]

A decade later, President Jackson faced a recognition crisis over Texas. In 1835, Texas rebelled against Mexico and formed its own government. See Goebel 144–147. But the President feared that recognizing the new government could ignite a war. [...] After Congress urged him to recognize Texas, [...] the President delivered a message to the Legislature. He concluded there had not been a "deliberate inquiry" into whether the President or Congress possessed the recognition power. […]. He stated, however, "on the ground of expediency, I am disposed to concur" with Congress' preference regarding Texas[...]. Thus, although he cooperated with Congress, the President was left to execute the formal act of recognition.

President Lincoln, too, sought to coordinate with Congress when he requested support for his recognition of Liberia and Haiti. [...] Nonetheless, he was "[u]nwilling" to "inaugurate a novel policy in regard to them without the approbation of Congress." *Ibid.* In response Congress concurred in the President's recognition determination and enacted a law appropriating funds to appoint diplomatic representatives to the two countries—leaving, as usual, the actual dispatch of ambassadors and formal statement of recognition to the President. [...]

Three decades later, the branches again were able to reach an accord, this time with regard to Cuba. In 1898, an insurgency against the Spanish colonial government was raging in Cuba. President McKinley determined to ask Congress for authorization to send armed forces to Cuba to help quell the violence. [...] Accepting the compromise, the President signed the joint resolution. See Reinstein, 86 Temp. L. Rev., at 41.

For the next 80 years, "[P]residents consistently recognized new states and governments without any serious opposition from, or activity in, Congress." [...] The next debate over recognition did not occur until the late 1970's. It concerned China.

President Carter recognized the People's Republic of China (PRC) as the government of China, and derecognized the Republic of China, located on Taiwan. [...] The President proposed a new law defining how the United States would conduct business with Taiwan. [...] After extensive revisions, Congress passed, and the President signed, the Taiwan Relations Act, 93Stat. 14 (1979) [...] The Act (in a simplified summary) treated Taiwan as if it were a legally distinct entity from China[.]

Throughout the legislative process, however, no one raised a serious question regarding the President's exclusive authority to recognize the PRC—or to decline to grant formal recognition to Taiwan. [...] Rather, Congress accepted the President's recognition determination as a completed, lawful act; and it proceeded to outline the trade and policy provisions that, in its judgment, were appropriate in light of that decision. [...]

For the most part, Congress has respected the Executive's policies and positions as to 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. […].

That is, §214(d) requires the President, through the Secretary, to identify citizens born in Jerusalem who so request as being born in Israel. […]. As a matter of United States policy, neither Israel nor any other country is acknowledged as having sovereignty over 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. [...] 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. [...]

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. [...] The Secretary's position on this point has been consistent: He will not place information in the place-of-birth section of a passport that contradicts the President's recognition policy. See 7 FAM §1383. If a citizen objects to the country listed as sovereign over his place of birth, then the Secretary will accommodate him by listing the city or town of birth rather than the country. See *id.,* §1383.6. But the Secretary will not list a sovereign that contradicts the President's recognition policy in a passport. [...]

The House Conference Report proclaimed that §214 "contains four provisions related to the recognition of Jerusalem as Israel's capital." [...] 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[.] This Congress may not do.

The Court does not question the power of Congress to enact passport legislation of wide scope. In *Kent* v. *Dulles*, for example, the Court held that if a person's " 'liberty' " to travel "is to be regulated" through a passport, "it must be pursuant to the law-making functions of the Congress." See *id*., at 129. Later cases, such as *Zemel* v. *Rusk* and *Haig* v. *Agee*, also proceeded on the assumption that Congress must authorize the grounds on which passports may be approved or denied. [...]

To allow Congress to control the President's communication in the context of a formal recognition determination is to allow Congress to exercise that exclusive power itself. [...]

* * *

This case is confined solely to the exclusive power of the President to control recognition determinations[.]

*Affirmed.*