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**ZIVOTOFSKY v. KERRY: CHOOSING INTERNATIONAL
REPUTATION OVER SEPARATION OF POWERS**

HANNAH COLE-CHU*

In June 2015, the United States Supreme Court decided *Zivotofsky v. Kerry*.¹ In *Zivotofsky*, the Court considered the constitutionality of Section 214(d) of the Foreign Relations Authorization Act of 2003, which permitted a United States citizen born in Jerusalem to record the birthplace on his or her passport as “Israel.”² Menachem Biyamin Zivotofsky, a United States citizen, was born in Jerusalem soon after the statute was enacted, and his parents applied for a passport and a Consular Report of Birth Abroad on his behalf.³ They requested that the United States Embassy record his birthplace as “Jerusalem, Israel.”⁴ The embassy refused, citing U.S. State Department policy authorizing it to designate only “Jerusalem” as the birthplace on passports of United States citizens born in Jerusalem.⁵ Seeking to enforce Section 214(d), Zivotofsky’s parents brought suit.⁶

After more than a decade litigating the justiciability of Zivotofsky’s claims, the Supreme Court reached the merits of the case.⁷ Zivotofsky argued that the United States violated his statutory right to record his birthplace as “Israel” on his passport, which Congress conferred on him pursuant to its Article I lawmaking power.⁸ The United States responded that the statute was unconstitutional because it infringed on the President’s exclusive power to recognize foreign sovereigns.⁹ Specifically, Section 214(d) contradicted the President’s longstanding policy of neutrality over

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1. 135 S. Ct. 2076 (2015).
2. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1365–66 (2002), declared unconstitutional by *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).
3. *Zivotofsky*, 135 S. Ct. at 2083.
4. *Id.*
5. *Id.*
6. *Zivotofsky v. Secretary of State*, Nos. 03-1921, 03-2048, 2004 WL 5835212, at *1 (D.D.C. Sept. 7, 2004), *rev’d*, 444 F.3d 614 (2006).
7. *See infra* Part I.
8. *Zivotofsky*, 135 S. Ct. at 2083.
9. *Id.* at 2084.

the status of Jerusalem.¹⁰ The Court sought to determine whether the President had the exclusive recognition power, and, if so, whether Section 214(d) of the Foreign Relations Authorization Act of 2003 infringed on that power.¹¹

Ultimately, the *Zivotofsky* Court struck down the statute.¹² The majority held that the President has the exclusive power to recognize foreign sovereigns and determine recognition policy, and that Congress could not force the President to contradict formal statements of recognition.¹³ The Court reasoned that the United States must have a single recognition policy announced by “one voice,” and that voice must be the President’s.¹⁴ The Court determined that Section 214(d), in allowing United States citizens born in Jerusalem to record their birthplace as “Israel,” forced the President to contradict his position of neutrality as to the status of Jerusalem.¹⁵ For this reason, the statute was unconstitutional.¹⁶

In *Zivotofsky*, the Court confronted a remarkable legal panorama. At first glance, *Zivotofsky* was a separation of powers case involving a dispute over power between Congress and the President. The precise configuration of the dispute, however, was unique. First, *Zivotofsky* involved the very rare occasion in which the President intentionally contravened an act of Congress.¹⁷ *Zivotofsky* was also remarkable because virtually no legal precedent existed to guide the Court’s analysis of the scope and allocation of the recognition power.¹⁸ Historical practice of the recognition power, moreover, was sufficiently inconsistent that it did not provide any guidance as to how the power should be allocated.¹⁹

Additionally, *Zivotofsky* was a separation of powers case in the realm of foreign affairs. The debate over the division of power between Congress and the President in foreign affairs is as old as the Nation itself and, without doubt, remains unresolved.²⁰ Supreme Court precedent is infused with competing and contradictory theories of separation of powers, and it provides what seems, at times, rudderless guidance.²¹ Finally, *Zivotofsky*

10. *Id.*

11. *Id.* at 2081.

12. *Id.* at 2096.

13. *Id.* at 2094–95.

14. *Id.* at 2086.

15. *Id.* at 2094.

16. *Id.* at 2096.

17. *See infra* Part II.B.

18. *See infra* Part II.A.

19. *Zivotofsky*, 135 S. Ct. at 2091.

20. *See infra* Parts II.B., IV.A–B.

21. *See infra* Part II.B.

implicated the ancient conflict over the status of Jerusalem, arguably the most sensitive international conflict in the world.²²

Acknowledging the significant doctrinal challenges and sensitivity of the issue in *Zivotofsky*, this Note argues that the Court erred in striking down Section 214(d).²³ The Court correctly held that the President has the exclusive power to effect recognition and determine recognition policy.²⁴ The Court erred, however, in holding that Congress may not force the President to contradict statements regarding recognition.²⁵ This rule, which defines what constitutes “infringement” of the recognition power, encompasses otherwise constitutionally enacted legislation and impermissibly invades Congress’s Article I legislative powers. Instead, the Court should have limited its definition of infringement only to the exercise of the recognition power itself by any branch other than the President.²⁶ Accordingly, Section 214(d), which was not a formal act of recognition, did not infringe on the President’s exclusive recognition power.²⁷ Moreover, the statute is independently constitutional under the Foreign Commerce Clause.²⁸

In *Zivotofsky*, the Court also seized an opportunity to decide issues completely separate from the merits of Zivotofsky’s claims. The Court corrected two of the greatest flaws in foreign affairs jurisprudence: Justice Sutherland’s theory of inherent executive power and his mischaracterization of the sole organ theory—both introduced by *United States v. Curtiss-Wright Export Corp.*²⁹ In doing so, the *Zivotofsky* Court signaled a shift in the theoretical framework through which it has decided foreign affairs cases towards a more balanced theory of separation of powers in foreign affairs.³⁰

I. THE CASE

In 2002, Congress passed the Foreign Relations Authorization Act (the “Act”).³¹ Section 214(d) of the Act provides: “[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

22. *Zivotofsky*, 135 S. Ct. at 2081.

23. *See infra* Part IV.C–D.

24. *See infra* Part IV.B–C.

25. *See infra* Part IV.C.

26. *See infra* Part IV.C.

27. *See infra* Part IV.C.

28. *See infra* Part IV.D.

29. 299 U.S. 304 (1936). *See infra* Part IV.A.

30. *See infra* Part IV.A.

31. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002).

place of birth as Israel.”³² Shortly thereafter, Menachem Binyamin Zivotofsky was born in Jerusalem to Ari Zivotofsky and Naomi Siegman, both United States citizens.³³ In December 2002, Zivotofsky’s mother went to the American Embassy in Tel Aviv to apply for a passport and a Consular Report of Birth Abroad³⁴ on her son’s behalf, and requested that the documents record his birthplace as “Jerusalem, Israel.”³⁵ The Embassy refused, explaining that U.S. State Department policy would only permit “Jerusalem” to be listed as Zivotofsky’s birthplace.³⁶

Seeking to enforce Section 214(d) of the Foreign Relations Authorization Act, Zivotofsky’s parents filed suit against the Secretary of State in the United States District Court for the District of Columbia in 2003.³⁷ Zivotofsky sought a declaratory judgment, claiming that the Secretary of State’s failure to follow the mandate of Section 214(d) breached a duty owed to Zivotofsky.³⁸ Additionally, Zivotofsky sought an injunction ordering the Secretary of State to issue a Consular Report of Birth Abroad and a U.S. passport recording “Jerusalem, Israel,” as Zivotofsky’s birthplace, and to order consular personnel at U.S. embassies and consulates to comply with Section 214(d).³⁹ Approximately one month after Zivotofsky filed his complaint, U.S. citizen parents of another child born in Jerusalem, E.O. Odenheimer, filed a Writ of Mandamus in the United States District Court for the District of Columbia, bringing similar claims against the Secretary of State.⁴⁰ Because of the common issues presented, the district court consolidated the two cases.⁴¹

The Government moved to dismiss the plaintiffs’ claims on several grounds, including that Zivotofsky and Odenheimer lacked standing, the case presented a nonjusticiable political question, and the statute was permissive rather than mandatory.⁴² In a brief opinion, the district court

32. § 214(d), 116 Stat. at 1366.

33. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083 (2015).

34. A Consular Report of Birth Abroad is “a formal document certifying the acquisition of U.S. citizenship at birth of a person born abroad.” U.S. DEP’T OF STATE, 7 FAM § 1441(a) (2015), <https://fam.state.gov/FAM/07FAM/07FAM1440.html>. The abbreviation “FAM” is short for “Foreign Affairs Manual.”

35. *Zivotofsky*, 135 S. Ct. at 2083.

36. *Id.*

37. *Zivotofsky v. Secretary of State*, Nos. 03-1921, 03-2048, 2004 WL 5835212, at *2 (D.D.C. Sept. 7, 2004), *rev’d*, 444 F.3d 614 (2006).

38. *Id.*

39. *Id.*

40. *Id.* Among several claims, Odenheimer’s parents argued that the Secretary of State breached a duty to Odenheimer by failing to comply with § 214(d), and violated Odenheimer’s equal protection and due process rights. *Id.*

41. *Id.*

42. *Id.*

held that Zivotofsky's and Odenheimer's claims were not justiciable.⁴³ First, the court held that the Secretary of State's failure to record "Jerusalem, Israel" on the plaintiffs' passports was not an injury in fact sufficient to confer standing.⁴⁴ Second, the district court held that the plaintiffs' claims constituted a nonjusticiable political question.⁴⁵ A core issue in the case, the court reasoned, was the authority to recognize sovereigns and conduct foreign policy—a power constitutionally committed to the President.⁴⁶ As such, the case fell within the ambit of the defining political question case, *Baker v. Carr*,⁴⁷ and cases establishing that the recognition of sovereigns is committed to the Executive.⁴⁸ Therefore, because the cases were not justiciable, the district court dismissed the plaintiffs' claims.⁴⁹

On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's holding and ruled that Zivotofsky had standing.⁵⁰ Relying primarily on *Linda R.S. v. Richard D.*,⁵¹ the court of appeals explained that Congress conferred a statutory right on Zivotofsky to record "Israel" as his birthplace on his passport, which was violated when the Secretary of State refused to do so, and this violation was sufficient to show standing.⁵² The court of appeals also held that the district court's basis for ruling that Zivotofsky's claim constituted a political question was incorrect.⁵³ Specifically, the district court erroneously framed the issue in the case as implicating the recognition power, which is solely a function of the President.⁵⁴ Instead, the issue was whether Section 214(d) entitled Zivotofsky to have "Israel" listed as his place of birth on his passport and Consular Birth Report, and, if so, whether

43. *Id.* at *4.

44. *Id.* at *3. The court argued that "the mere existence of a statute does not negate 'the requirement that the party seeking review must himself have suffered an injury.'" *Id.* (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972)).

45. *Id.* at *4.

46. *Id.*

47. 369 U.S. 186, 212 (1962) ("recognition of foreign governments . . . strongly defies judicial treatment").

48. *Zivotofsky*, 2004 WL 5835212, at *4 (citing *Goldwater v. Carter*, 617 F.2d 697, 707–08 (D.C. Cir. 1979) (en banc), vacated on other grounds, 444 U.S. 996 (1979); *United States v. City of Arlington*, 669 F.2d 925, 929 (4th Cir. 1982)).

49. *Zivotofsky*, 2004 WL 5835212, at *4.

50. *Zivotofsky v. Secretary of State*, 444 F.3d 614, 619 (D.C. Cir. 2006), remanded to 511 F. Supp. 2d 97 (D.D.C. 2007).

51. 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.").

52. *Zivotofsky*, 444 F.3d at 619 (citing *Linda R.S.*, 410 U.S. at 617 n.3).

53. *Id.*; see *supra* notes 43–46 and accompanying text.

54. *Zivotofsky*, 444 F.3d at 619.

this right was mandatory or advisory.⁵⁵ The court of appeals remanded the case to develop the record on this issue.⁵⁶

On remand, the parties engaged in discovery and filed dispositive motions on the political question issue.⁵⁷ The district court again held that Zivotofsky's claims presented a political question and dismissed the case.⁵⁸ Zivotofsky appealed a second time, and the court of appeals affirmed.⁵⁹ This time the court of appeals framed the issue as "whether the State Department [could] lawfully refuse to record [Zivotofsky's] place of birth as 'Israel' in the face of a statute that directs it to do so."⁶⁰ The court concluded that it could not reach this issue, however, because the President's recognition power is exclusive, and policy decisions implicating the recognition power are nonjusticiable political questions.⁶¹ Section 214(d)'s requirement, the court explained, implicated one of those policy decisions.⁶² In a lengthy concurring opinion, one judge argued that judicial review was appropriate and required only that the court determine whether Section 214(d) was constitutional.⁶³ The statute was unconstitutional, the judge concluded, because it infringed on the exclusive recognition power of the President.⁶⁴

Zivotofsky filed a petition for writ of certiorari, which the United States Supreme Court granted on May 2, 2011.⁶⁵ The issues before the Court were whether Zivotofsky's claim constituted a nonjusticiable political question and, if not, whether Section 214(d) impermissibly infringed on the President's power to recognize foreign sovereigns.⁶⁶

In what would ultimately be the first of two *Zivotofsky* opinions, the Supreme Court held that *Zivotofsky* did not constitute a nonjusticiable political question.⁶⁷ The Court explained that the lower courts improperly framed the issue as requiring a determination of whether Jerusalem is the

55. *Id.*

56. *Id.* at 620.

57. *Zivotofsky v. Secretary of State*, 511 F. Supp. 2d 97, 101 (D.D.C. 2007), *aff'd*, 571 F.3d 1227 (D.C. Cir. 2009).

58. *Zivotofsky*, 511 F. Supp. 2d at 102. The district court held that *Zivotofsky* presented an issue (A) textually committed to the political branches of the government; (B) lacking judicially manageable standards for resolving the issue; and (C) impossible to resolve without expressing lack of respect to coordinate branches of government. *Id.* at 103–05.

59. *Zivotofsky*, 571 F.3d at 1233, *reh'g en banc denied*, 610 F.3d 84 (D.C. Cir. 2010), *rev'd*, 132 S. Ct. 1421 (2012).

60. *Id.* at 1230.

61. *Id.* at 1231.

62. *Id.* at 1233.

63. *Id.* at 1240 (Edwards, J., concurring).

64. *Id.* at 1245.

65. *Zivotofsky v. Clinton*, 131 S. Ct. 2897 (2011) (mem.).

66. *Id.*

67. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1426–27, 1430 (2012), *remanded to* 725 F.3d 197, 214 (D.C. Cir. 2013).

capital of Israel.⁶⁸ Instead, the issue in the case was whether Section 214(d) was constitutional, the determination of which depended on whether the statute impermissibly intruded upon presidential power.⁶⁹ Determining the constitutionality of a statute, the Court explained, was precisely within the purview of the judiciary and, as a result, the case was justiciable.⁷⁰ The Court declined to discuss the merits of Zivotofsky's claims, and instead vacated judgment and remanded the case to the court of appeals to address the constitutionality of Section 214(d).⁷¹

Before the D.C. Circuit for the third time, the court held that Section 214(d) was unconstitutional because the President has the exclusive power to recognize or withhold recognition of a sovereign, and Section 214(d) infringes on that power.⁷² The court relied on longstanding post-ratification history, Supreme Court precedent, and the proposition that "the President has 'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.'" ⁷³ Because Section 214(d) "runs headlong into a carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem," the statute was unconstitutional.⁷⁴

Zivotofsky again filed a writ of certiorari, which the U.S. Supreme Court granted.⁷⁵ The first issue before the Court was whether the President has the exclusive power to grant formal recognition to a foreign sovereign.⁷⁶ The second issue was whether, in the event the President has the exclusive recognition power, Congress can command the President to issue a formal statement that contradicts the earlier recognition.⁷⁷

II. LEGAL BACKGROUND

Several intersecting constitutional analyses determine the outcome of the issues in *Zivotofsky*. First, though courts have dealt peripherally with the recognition power in a handful of cases, none involve a dispute between Congress and the President over the scope and nature of the recognition power.⁷⁸ This remarkable lack of legal authority leads to the second area of

68. *Id.* at 1427.

69. *Id.* at 1428.

70. *Id.* (citing *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991)).

71. *Id.* at 1431.

72. *Zivotofsky v. Secretary of State*, 725 F.3d 197, 214, 220 (D.C. Cir. 2013), *aff'd*, 135 S. Ct. 2076 (2015).

73. *Id.* at 211 (quoting *Clinton v. City of New York*, 524 U.S. 417, 445 (1998) (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

74. *Id.* at 220.

75. *Zivotofsky v. Kerry*, 134 S. Ct. 1873 (2014) (mem.).

76. *Id.*

77. *Id.*

78. *See infra* Part II.A.

analysis: how the United States Supreme Court has historically determined constitutional power in the realm of foreign affairs.⁷⁹ The Constitution enumerates few powers relating to foreign affairs and, as a result, the Court relies heavily on theories of separation of powers to determine the outcome of foreign affairs cases.⁸⁰ At different points in history, however, the Court has applied different theories to define congressional and presidential power in foreign affairs.⁸¹ As a result, jurisprudence regarding foreign affairs is at best inconsistent and at worst irreconcilable.

Independent of recognition, Congress and the President share the power to regulate passports.⁸² Though the Court has never ruled on Congress's constitutional authority to enact passport legislation, Congress has enacted many passport laws and the Court, in substantial part, has assumed the constitutionality of those laws.⁸³ Moreover, Congress has broad authority to regulate the channels and instrumentalities of foreign commerce through the Foreign Commerce Clause of Article I.⁸⁴

A. No Binding Legal Precedent Exists Involving a Dispute Between Congress and the President over the Recognition Power

“Recognition is the act by which ‘a state commits itself to treat an entity as a state or to treat a regime as the government of a state.’”⁸⁵ A formally recognized foreign country may bring suit in United States courts,⁸⁶ benefit from the act of state doctrine,⁸⁷ and exercise sovereign immunity.⁸⁸ An act of recognition is retroactive and “validates all actions and conduct of the government so recognized from the commencement of its existence.”⁸⁹ Furthermore, formal recognition allows for the initiation of official diplomatic relations.⁹⁰ Determinations of recognition are binding on the judiciary, and are not subject to judicial review.⁹¹ Courts may, however, discuss the legal consequences of recognition.⁹²

79. *See infra* Part II.B.

80. *See infra* Part II.B.

81. *See infra* Part II.B.

82. *See infra* Part II.C.

83. *See infra* Part II.C.

84. *See infra* Part II.D.

85. *Zivotofsky v. Secretary of State*, 725 F.3d 197, 205 (D.C. Cir. 2013) (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 94(1) (1965)).

86. *Guar. Tr. Co. of New York v. United States*, 304 U.S. 126, 137 (1938).

87. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302–03 (1918); *Underhill v. Hernandez*, 168 U.S. 250, 253 (1897).

88. *Nat'l City Bank of New York v. China*, 348 U.S. 356, 358–59 (1955).

89. *United States v. Belmont*, 301 U.S. 324, 328 (1937).

90. *Guar. Tr. Co. of New York*, 304 U.S. at 138.

91. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410–11 (1964) (explaining that the judiciary may not permit a government not recognized by the executive branch to file suit because that could be construed as an act of judicial recognition); *Nat'l City*

Despite the importance of the recognition power to international relations, very little primary legal authority discusses it. The text of the Constitution does not contain any express reference to the recognition power, and scant historical evidence provides little indication the Framers intended to commit the recognition power to any one branch of the federal government.⁹³ Moreover, the Court has never addressed a dispute between Congress and the President over the scope and nature of the recognition power. Supreme Court precedent involving the recognition power holds that only the federal government may exercise the recognition power,⁹⁴ but the Court's statements of how that power is allocated within the federal government consists of conflicting dicta.⁹⁵ Some cases define the recognition power as shared between Congress and the President.⁹⁶ Other cases state that the recognition power is exclusively the domain of the President.⁹⁷ Notably, the distribution of the recognition power within the

Bank of New York, 348 U.S. at 358 (declining to review the status of the Republic of China because it was “outside the competence of [the] Court”); *Oetjen*, 246 U.S. at 302 (quoting *Jones v. United States*, 137 U.S. 202, 212 (1890) (holding that recognition policy is conclusively binding on a court)); *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 420 (1839) (holding that the assumption of sovereignty of a foreign country is binding on courts); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634–35 (1818) (arguing that any decision by a court that constitutes an act of recognition would “transcend the limits prescribed to the judicial department”).

92. *Guar. Tr. Co. of New York*, 304 U.S. at 139.

93. *Zivotofsky v. Secretary of State*, 725 F.3d 197, 206–07 (D.C. Cir. 2013), *aff'd*, 135 S. Ct. 2076 (2015). On remand, the D.C. Circuit explained that the Federalist papers make no mention of the recognition power and there is no record that recognition was discussed at the Constitutional Convention. *Id.* The only ratification-era evidence discussing the recognition power, the court argued, was a writing by Hamilton in 1793, published under the name “Pacificus” declaring that the “receive ambassadors” clause gave the President power over recognition. *Id.* (citing United States National Archives, *Pacificus No. 1* (June 29, 1793), <http://founders.archives.gov/?q=pacificus&s=1111311111&sa=&r=7&sr=>).

94. *United States v. Pink*, 315 U.S. 203, 233 (1942). In *Pink*, the Court held that a state may not reject an act of recognition by the federal government because “[s]uch power is not accorded a State in our constitutional system,” and to allow it would be a “dangerous invasion of Federal authority.” *Id.*; *see also* *United States v. Belmont*, 301 U.S. 324, 331–32 (1937) (holding that federal action in foreign affairs is binding on state constitutions, laws, and policies).

95. *See infra* notes 96–97 and accompanying text.

96. *Guar. Tr. Co. of New York*, 304 U.S. at 137 (“[Recognition] . . . is to be determined by the political department of the government.”); *Oetjen*, 246 U.S. at 302 (explaining that the sovereignty of a nation “is a political question” to be determined “by the legislative and executive departments”); *Palmer*, 16 U.S. (3 Wheat.) at 645 (“[T]he courts of the union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States.”).

97. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) (“Political recognition is exclusively a function of the Executive.”); *Nat’l City Bank of New York v. China*, 348 U.S. 356, 358 (1955) (holding that recognition is a “matter for determination by the Executive”); *Pink*, 315 U.S. at 229 (holding that the President has the power to both determine a policy of recognition and then make that determination); *Belmont*, 301 U.S. at 330 (explaining it “may not be doubted” that the President has power to implement policies to effect recognition); *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 420 (1839) (holding that the executive branch of the government, “charged” with managing foreign relations, makes determinations of recognition).

federal government was not at issue in any of these cases. Instead, existing case law involving the recognition power involves state or judicial action implicating recognition.⁹⁸

B. Supreme Court Precedent Discussing Presidential Power in Foreign Affairs Is Inconsistent Because the Court Has Relied on Multiple Theories of Separation of Powers

The text of the United States Constitution enumerates few powers relating to foreign affairs. The President is the Commander in Chief⁹⁹ and has the duty to receive ambassadors from other nations.¹⁰⁰ Congress has the power to regulate foreign commerce, raise armies, issue letters of marque and reprisal, and to declare war.¹⁰¹ The President and Congress share the power to enter into treaties, and appoint ambassadors and other public officials.¹⁰² Because the actual conduct of foreign affairs involves much more than the text of the Constitution expressly contemplates, conflicts regularly arise between Congress and the President over how this power is allocated.¹⁰³ When the political branches resort to the courts to resolve a dispute over power in foreign affairs, the Court, often without guidance from the text of the Constitution, routinely relies on theories of separation of powers to determine the outcome of the dispute.¹⁰⁴

At different points in history, however, the Court has invoked different theories of separation of powers to resolve conflicts between Congress and the President. Indeed, the Court's two most famous foreign affairs

98. See *supra* notes 91 & 94.

99. U.S. CONST. art. II, § 2, cl. 1.

100. U.S. CONST. art. II, § 3, cl. 3.

101. U.S. CONST. art. I, § 8.

102. U.S. CONST. art. II, § 2.

103. One significant exception to this proposition exists, which is of particular importance to *Zivotofsky*: the President's role as the sole organ of communication with foreign nations has not been subject to significant challenge in the courts. See *infra* Part IV.B. The doctrine, also called the "one voice" doctrine, most commonly appeared in foreign commerce cases as a rationale for prohibiting states from participating in foreign commerce. See, e.g., *Japan Line, Ltd. v. Cty. of Los Angeles*, 441 U.S. 434, 451 (1979) (holding that courts should consider the extent to which a commerce law "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments'"); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (holding that the President has power to effect recognition "as the sole organ of [the federal] government"). The sole organ doctrine has also been referred to as a textually committed power of the President not subject to review by courts. See *Baker v. Carr*, 369 U.S. 186, 211–12 (1962) (explaining that not all foreign affairs cases present political questions, but some demand a "single-voiced statement of the Government's views"). See generally *Zadvydas v. Davis*, 533 U.S. 678, 700, 711 (2001) (noting the importance that the nation "speak with one voice"); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000) (arguing that the issue in the case "compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments"); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 (2003) (same).

104. See *infra* notes 105–106.

decisions appear to be diametrically opposed. In *United States v. Curtiss-Wright Export Corp.*, a case challenging President Truman's exercise of unilateral action during the Korean War, the Court declared that the President has inherent and plenary authority to conduct the Nation's foreign affairs.¹⁰⁵ Sixteen years later, however, in *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁰⁶ Justice Jackson stated in his canonical concurring opinion that the President's power to act in any situation—including in foreign affairs—depends on its “disjunction or conjunction” with the powers of Congress.¹⁰⁷ What distinguishes these and other Supreme Court cases involving foreign affairs are the underlying theories that guide the Supreme Court to reach its conclusion. One holds that the President has broad and inherent power, and the other subjects presidential power to the control of Congress.¹⁰⁸ *Curtiss-Wright* and *Youngstown*, each with its own legacy, represent the ever-present and unresolved debate over separation of powers in foreign affairs.¹⁰⁹

In the early years after the Constitution was ratified, the Court viewed presidential power in foreign affairs as almost completely dependent on express congressional authorization and, therefore, strictly construed all delegations of power.¹¹⁰ The President was prohibited from acting in foreign affairs without a statutory delegation of power¹¹¹ or other authorizing act, such as declaring war.¹¹² The Court eventually recognized one narrow instance when the President could act unilaterally: to repel immediate and internal attacks.¹¹³ Against this background, *Curtiss-Wright* marked the introduction of a drastically different view of presidential power in foreign affairs: the President has *inherent* power to conduct foreign

105. 299 U.S. 304, 320 (1936).

106. 343 U.S. 579 (1952).

107. *Id.* at 635 (Jackson, J., concurring).

108. To quote Justice Jackson in *Youngstown*, this dichotomy of presidential power is an “over-simplified grouping.” *Id.* It is, nevertheless, a useful framework through which to review foreign affairs precedent as it relates to *Zivotofsky*.

109. Justice Jackson noted in *Youngstown*, “A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.” 343 U.S. at 634–35 (Jackson, J., concurring).

110. *See, e.g., Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28–29 (1801) (upholding the U.S. recapture of a French vessel based exclusively on statutory grants of power and explaining that “the whole powers of war” are vested in Congress and one must examine “acts of congress” to understand American hostilities with France); *United States v. Smith*, 27 F. Cas. 1192, 1229–30 (C.C.N.Y. 1806) (No. 16,342) (holding that despite the President's approval of a secret mission, the Constitution does not vest the President with authority to engage in a military expedition against a county with which the United States is at peace).

111. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178–79 (1804) (prohibiting the President from construing a statute to give it greater effect even during wartime hostilities because doing so was acting beyond the authority granted by Congress).

112. *Smith*, 27 F. Cas. at 1229–30.

113. *The Prize Cases*, 67 U.S. (2 Black) 635, 691–92 (1863).

affairs.¹¹⁴ In *Curtiss-Wright*, the Court upheld the constitutionality of a congressional delegation of lawmaking authority to the President.¹¹⁵ The greatest legacy of the case, however, is not its holding, but Justice Sutherland's extraordinary discussion of the origin and nature of presidential power in foreign affairs.¹¹⁶

Writing for the majority, Justice Sutherland first argued that the source of the President's power in foreign affairs originates outside the Constitution.¹¹⁷ In domestic affairs, he explained, the federal government may only exercise those powers specifically enumerated in the Constitution.¹¹⁸ The Founders vested these express grants of constitutional power in the federal government by carving them from powers possessed by the states.¹¹⁹ The power to conduct foreign affairs, however, was never possessed by the states, and, therefore, could not have been stripped from the states and vested in the federal government.¹²⁰ The power instead passed directly from the British Crown to the federal government, vesting it with the power to conduct foreign affairs independent of any affirmative grant of power by the Constitution.¹²¹

Justice Sutherland used this distinction to argue that the President's power in foreign affairs was inherent and plenary.¹²² He quoted a speech by then-Congressman John Marshall, given on the floor of the House of Representatives in 1800,¹²³ to support his conclusion that the President is not only the "sole representative" of the nation,¹²⁴ but also the "sole organ of the federal government in the field of international relations."¹²⁵ He continued, arguing that there is little room for Congress to participate in foreign affairs:

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.¹²⁶

114. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

115. *Id.* at 329.

116. *Id.* at 315–22.

117. *Id.* at 316.

118. *Id.* at 315–16.

119. *Id.* at 316.

120. *Id.*

121. *Id.* at 318.

122. *Id.* at 320.

123. *Id.* at 319 (quoting 10 ANNALS OF CONG. 613 (1800)).

124. *Id.*

125. *Id.* at 320.

126. *Id.* at 319.

Ultimately, Justice Sutherland concluded that when a President acts pursuant to a congressional delegation of authority, and that action implicates foreign relations, the Court should not strictly construe congressional delegations of power.¹²⁷

Despite the Court acknowledging that these passages are dicta,¹²⁸ Justice Sutherland's conception of presidential power secured so strong a foothold in separation of powers jurisprudence that courts began to regularly rely on *Curtiss-Wright* in cases involving questions of presidential power.¹²⁹ In 1942, Justice Stone quoted *Curtiss-Wright* in *United States v. Pink*¹³⁰ to argue that the President has broad authority to put policies in place that give effect to a recognition decision because he is the "sole organ of the federal government in the field of international relations."¹³¹ *Curtiss-Wright* also paved the way for the Court to uphold many instances of unilateral presidential action during World War II.¹³²

Sixteen years after *Curtiss-Wright*, the Court decided *Youngstown*, marking yet another drastic shift in how it viewed separation of powers in

127. *Id.* at 322.

128. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 n.2 (1952) (Jackson, J., concurring).

129. *See, e.g.*, *Regan v. Wald*, 468 U.S. 222, 243 (1984) (sustaining the President's decision to restrict travel to Cuba due to "traditional deference to executive judgment" in foreign affairs); *Haig v. Agee*, 453 U.S. 280, 293–94 (1981) (stating that it is "generally accepted" that foreign policy is the domain of the President); *Goldwater v. Carter*, 444 U.S. 996, 1000 n.1 (1979) (Powell, J., concurring) ("The Court has recognized that, in the area of foreign policy, Congress may leave the President with wide discretion."); *United States v. Mazurie*, 419 U.S. 544, 556–57 (1975) (arguing that a congressional delegation of power should be not be construed stringently when the President "possesses independent authority over the subject matter"); *N.Y. Times v. United States*, 403 U.S. 713, 727 (1971) (Stewart, J., concurring) (explaining that the President's power in foreign affairs is "largely unchecked" by other branches); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (arguing that when Congress delegates the President authority in foreign affairs, it must "paint with a brush broader than that it customarily wields in domestic areas"); *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (explaining that the President is exclusively responsible for the conduct of foreign affairs); *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (emphasizing that the right to exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation" (citing *Curtiss-Wright*, 299 U.S. 304; then citing *Fing You Ting v. United States*, 149 U.S. 698, 713 (1893))); *Chicago & Southern Air Lines v. Waterman Corp.*, 333 U.S. 103, 111 (1948) (declining to review an executive order because the President is the Nation's "organ for foreign affairs").

130. 315 U.S. 203 (1942).

131. *Id.* at 229 (quoting *Curtiss-Wright*, 299 U.S. at 320).

132. *See, e.g.*, *Ex parte Quirin*, 317 U.S. 1, 41–42 (1942) (citing *Curtiss-Wright* to support deference to an executive action pursuant to congressional delegation); *Hirabayashi v. United States*, 320 U.S. 81, 85 (1943) (upholding an executive order authorizing "every possible protection" against spies and saboteurs); *Ex Parte Mitsuye Endo*, 323 U.S. 283, 298 (1944) ("Broad powers frequently granted to the President or other executive officers by Congress so that they may deal with the exigencies of wartime problems have been sustained."); *Korematsu v. United States*, 323 U.S. 214, 218–19 (1944) (relying on *Hirabayashi* to again uphold the executive order authorizing "every possible protection" against spies and saboteurs).

foreign affairs.¹³³ In *Youngstown*, President Truman issued an executive order seizing control of most of the steel mills in the United States, which he argued was constitutional pursuant to his “inherent power” as president.¹³⁴ The Court struck down the order, rejecting the general trend of cases following *Curtiss-Wright*.¹³⁵ Similar to *Curtiss-Wright*, the merits of *Youngstown* have faded into history. What remains, however, is Justice Jackson’s scheme of presidential power.¹³⁶

In a concurring opinion, Justice Jackson set forth three categories of presidential power based on their “disjunction or conjunction with those of Congress.”¹³⁷ The first category applies where the President acts pursuant to the express or implied authorization of Congress; in these instances, his authority is at its maximum.¹³⁸ The second category refers to a constitutional “zone of twilight,” where the President acts in absence of either a congressional grant or denial of authority.¹³⁹ Under these circumstances, the President can rely only on his own powers.¹⁴⁰ The final category refers to when the President takes measures incompatible with the expressed or implied will of Congress.¹⁴¹ Here, the President’s power is “at its lowest ebb,” and he can rely only on his powers minus Congress’s power over the matter.¹⁴²

Of particular relevance to *Zivotofsky* is Jackson’s final category, referred to as the “Third Category” or a “lowest ebb case.” For this brand of conflict, Jackson anticipated an exception: “Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”¹⁴³

Justice Jackson relegated *Curtiss-Wright* to a footnote¹⁴⁴ and flatly rejected the concept of inherent powers.¹⁴⁵ In the years since *Youngstown*,

133. *Youngstown*, 343 U.S. 579.

134. *Id.* at 582, 583–84, 589.

135. Despite imminent labor strikes that would shut down American steel mills and discontinue the production of steel during the Korean War, the Court held that President Truman did not have statutory or constitutional authority to seize the steel mills. *Id.* at 588–89. In so holding, the *Youngstown* majority expressly rejected President Truman’s assertion of “inherent power” to issue the executive order. *Id.*

136. *Id.* at 634–55 (Jackson, J., concurring).

137. *Id.* at 635.

138. *Id.*

139. *Id.* at 637.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 637–38 (footnote omitted).

144. *Id.* at 635–36 n.2.

145. *Id.* at 652.

courts have relied on Justice Jackson's scheme of power between the political branches to determine the scope of presidential power in foreign affairs.

C. The Court Views the President's Power over Passport Regulation as Dependent on Congressional Delegation

A passport is "a travel document . . . issued under the authority of the Secretary of State attesting to the identity and nationality of the bearer,"¹⁴⁶ and is proof of United States citizenship.¹⁴⁷ Federal law prohibits a person from entering or exiting the United States without a passport,¹⁴⁸ though this law is subject to several exceptions.¹⁴⁹

In the first fifty years after the Constitution was ratified, Congress passed several laws regulating passports.¹⁵⁰ During that time, however, the federal government did not have exclusive control over all passports, and officials at all levels of local, state, and federal government issued various types of documents certifying citizenship or introducing foreign officials to other sovereign states.¹⁵¹ Congress sought to establish a uniform passport policy in 1856 when it enacted a general passport statute, broadly authorizing the Secretary of State and "no other person" to grant and issue passports.¹⁵² This statute eventually became the Passport Act of 1926,¹⁵³

146. 22 C.F.R. § 51.1 (2015).

147. 22 U.S.C. § 2705 (2012) (A passport "shall have the same force and effect as proof of United States citizenship as certificates of naturalization."); *see also* *Magnuson v. Baker*, 911 F.2d 330, 334 (9th Cir. 1990) (holding that 22 U.S.C. § 2705 was "a clear instruction from Congress to treat passports in the same manner as certificates of citizenship or certificates of naturalization in all respects"). *But see* *United States v. Moreno*, 727 F.3d 255, 261 (3d Cir. 2013) (holding that a passport only serves as conclusive proof of U.S. citizenship if the bearer was a U.S. citizen at the time of issuance).

148. 8 U.S.C. § 1185 (2012); *see also* *Haig v. Agee*, 453 U.S. 280, 293 (1981) (citing 8 U.S.C. § 1185).

149. 22 C.F.R. § 53.2(b) (2015). Among several enumerated exceptions, the State Department allows members of the U.S. Armed Forces to enter the United States when carrying a military identification card, and has discretion to waive the passport requirement due to unforeseen emergency or humanitarian reasons. *Id.* §§ 53.2(b)(1), (9), (10).

150. *Kent v. Dulles*, 357 U.S. 116, 122 (1958) (listing passport statutes from the early nineteenth century); *see also* Act of Feb. 4, 1815, § 10, 3 Stat. 195, 199–200 (prohibiting a citizen from crossing into enemy territory without a passport).

151. *Kent*, 357 U.S. at 123.

152. Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. 52, 60–61 (to regulate the diplomatic and consular systems of the United States). The Supreme Court has discussed the possibility that Congress's enactment of broad passport legislation delegating substantial discretion to the Secretary of State reflects the originalist understanding that passport regulation was primarily the domain of the Secretary of State. *See Agee*, 453 U.S. at 293 (explaining that it was the "common perception" that the President had sole discretion over issuing passports during the ratification era); *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835) (explaining that the requirements for applying for a passport are "entirely discretionary" with the Secretary of State). *But see Kent*, 357 U.S. at 128–29 (explaining that Congress did not allow the Secretary of State "unbridled discretion" over passport regulations).

which remains the federal government's general passport statute.¹⁵⁴ The Passport Act delegates broad authority to the Secretary of State to "grant and issue" passports "under such rules as the President shall designate."¹⁵⁵ Pursuant to this delegation of authority, the Secretary of State has discretion over determining eligibility, issuing regulations pertaining to denial or revocation, and establishing procedures for review of denials and revocations, among other aspects of passport regulation.¹⁵⁶ Despite this delegation of authority, Congress still exercises its power to enact legislation affecting different aspects of passport regulation.¹⁵⁷

Courts have faced challenges to the validity of passport regulations, but the cases focus on the extent to which the Secretary of State may exercise discretion over passport regulation.¹⁵⁸ The Supreme Court has determined that the range of the Secretary's discretion depends on the congressional delegation of power.¹⁵⁹ Where the delegation is not express, the Court will look to congressional acquiescence and prior administrative practice to determine the Secretary of State's authority over passports.¹⁶⁰ Curiously, courts have not directly addressed Congress's constitutional authority to enact passport legislation.¹⁶¹ The Supreme Court, in cases

153. Act of July 3, 1926, Pub. L. No. 493, 44 Stat., Part I, 887 (regulating the issuance and validity of passports).

154. 22 U.S.C. § 211a (2012).

155. *Id.*

156. *See generally* 22 C.F.R. § 51.1–51.74 (2015) (passport regulations). The State Department elaborates on these regulations in its Foreign Affairs Manual. U.S. DEP'T. OF STATE, 7 FAM § 1300 (2015), <https://fam.state.gov/Fam/FAM.aspx?ID=07FAM>.

157. 8 U.S.C. § 1504 (2012) (cancellation of U.S. passports and consular reports of birth); 18 U.S.C. § 1542 (2012) (false statement in application and use of passport); 18 U.S.C. § 1543 (2012) (forgery or false use of passport); 18 U.S.C. § 1544 (2012) (misuse of passport); 22 U.S.C. § 212a (2012) (restriction of passports for sex tourism); 22 U.S.C. § 2714 (2012) (denial of passports to certain convicted drug traffickers); 42 U.S.C. § 652(k) (2012) (denial of passports for nonpayment of child support).

158. *See infra* notes 159–160 and accompanying text.

159. *See, e.g.,* *Haig v. Agee*, 453 U.S. 280, 290–91 (1981) (holding that the Passport Act of 1926 authorizes the President to revoke a passport based on concerns for national security); *Zemel v. Rusk*, 381 U.S. 1, 17–18 (1965) (holding that the Secretary of State had statutory authority to impose area travel restrictions); *Kent v. Dulles*, 357 U.S. 116, 130 (1958) (holding that the Passport Act of 1926 did not delegate authority to the Secretary of State to deny passports based on political affiliation).

160. *Agee*, 453 U.S. at 296–97 (explaining that Congress never attempted to repudiate the Secretary of State's revocations of passports for national security concerns); *Zemel*, 381 U.S. at 17–18 (reasoning that the Secretary of State had imposed area restrictions on many occasions without protest from Congress); *Kent*, 357 U.S. at 128 (explaining that the Secretary of State's regulation regarding denial of a passport was invalid because it was based on grounds not contemplated by the Passport Act of 1926); *see also* *Lynd v. Rusk*, 389 F.2d 940, 944 (D.C. Cir. 1967) (explaining that *Kent* and *Zemel* "make plain" that the Passport Act of 1926 "is broader than the authority it confers").

161. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), dealt with the constitutionality of a statute that prohibited a member of the Communist party from applying for or using a passport. *Id.* at 502. The Court ultimately found the statute unconstitutional, but not because Congress did

dealing with passport legislation, has assumed the Passport Act is constitutional and, consequently, Congress's authority to enact passport legislation.¹⁶²

D. Congress Has Broad Authority to Regulate Conduct Abroad Under the Foreign Commerce Clause

The Constitution provides, “[t]he Congress shall have the Power . . . To regulate Commerce with foreign Nations.”¹⁶³ Referred to as the Foreign Commerce Clause, this provision does not have as robust a body of case law as the Interstate Commerce Clause.¹⁶⁴ It is generally agreed, however, that the Foreign Commerce Clause is extremely broad, conferring exclusive and plenary authority on Congress to regulate foreign commerce with foreign nations.¹⁶⁵ A handful of cases even argue that the scope of the Foreign Commerce Clause is greater than that of the Interstate Commerce Clause because Congress is not limited by federalism or state sovereignty concerns.¹⁶⁶

The term “commerce” encompasses to “travel, trade, traffic, commerce, transportation, or communication . . . between any foreign country . . . and any State.”¹⁶⁷ Like its interstate analogue, the Foreign Commerce Clause comprehends the regulation of channels and instrumentalities of foreign commerce.¹⁶⁸ Its reach extends to goods and

not have the authority to enact it. *Id.* at 514, 517; *see also Zemel*, 381 U.S. at 6 (attacking the validity of the Passport Acts of 1926 and 1952 on the grounds that the statutes were unlawful delegations of lawmaking power to the Executive).

162. *Zemel*, 381 U.S. at 7–9 (discussing the legislative history of the Passport Act of 1926); *Kent*, 357 U.S. at 122–25 (detailing congressionally enacted passport statutes at length without questioning the constitutionality of their enactment).

163. U.S. CONST. art. I, § 8, cl. 3.

164. *United States v. Clark*, 435 F.3d 1100, 1102 (9th Cir. 2006) (stating that the scope of the Foreign Commerce Clause “has yet to be subjected to judicial scrutiny”).

165. *See California Bankers Ass’n v. Shultz*, 416 U.S. 21, 59 (1974) (explaining that Congress’s plenary authority to regulate foreign commerce is “well established”); *Bd. of Trustees of Univ. of Illinois v. United States*, 289 U.S. 48, 56 (1933) (foreign commerce power is “exclusive and plenary”); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193 (1824) (stating that Congress’s Commerce Power includes “every species of commercial intercourse between the United States and foreign nations”).

166. *E.g.*, *Clark*, 435 F.3d at 1103 (arguing that evidence exists that the Founders intended the scope of the foreign commerce power to be greater than the interstate commerce power) (citing *Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 448 (1979)). *But see Pittsburgh & S. Coal Co. v. Bates*, 156 U.S. 577, 587 (1895) (“The power to regulate commerce among the several States was granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations.”).

167. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 263 (1964).

168. *Japan Line*, 441 U.S. at 444 (instrumentalities); *Chicago & Southern Air Lines*, 333 U.S. 103, 104–05 (1948) (channels); *Henderson v. Mayor of New York*, 92 U.S. 259, 270 (1875) (channels); *Gibbons*, 22 U.S. (9 Wheat.) at 72 (channels). *United States v. Ballinger*, 395 F.3d 1218 (11th Cir. 2005), defines channels of commerce as the “transportation routes through which

services,¹⁶⁹ international travel by people,¹⁷⁰ and conduct in foreign countries that affects United States interests.¹⁷¹

III. THE COURT'S REASONING

In *Zivotofsky v. Kerry*, the United States Supreme Court affirmed the decision of the United States Court of Appeals for the District of Columbia Circuit, holding that Section 214(d) of the Foreign Relations Authorization Act was unconstitutional.¹⁷² The Court first concluded that the text and structure of the Constitution imply that the President has the power to recognize foreign sovereigns.¹⁷³ Next, the Court determined that precedent, historical practice, and functional considerations demonstrate that the President's recognition power is exclusive,¹⁷⁴ and that Congress may not force the President to contradict his own statements regarding recognition.¹⁷⁵ The Court found that Section 214(d) of the Foreign Relations Authorization Act forced the President to contradict his statement of recognition with respect to Jerusalem.¹⁷⁶ As a result, Section 214(d) infringed on his exclusive recognition power and, therefore, was unconstitutional.¹⁷⁷

Justice Kennedy, writing for the majority, framed the issue in *Zivotofsky* as falling in the third category of Justice Jackson's three-tiered framework of presidential power.¹⁷⁸ Both parties acknowledged that because the President was acting in contravention of a statute, his power was "at its lowest ebb," and the Court could only sustain it if the power is both "'exclusive' and 'conclusive' on the issue."¹⁷⁹ Within this framework, the majority first held that the text and the structure of the Constitution

persons and goods move," and instrumentalities as "the people and things themselves moving in commerce." *Id.* at 1225–26 (citations omitted).

169. *United States v. Martinez*, 599 F. Supp. 2d 784, 807 n.19, 807–08 (W.D. Tex. 2009) (child prostitution services).

170. *United States ex rel. Turner v. Williams*, 194 U.S. 279, 290 (1904); *Clark*, 435 F.3d. at 1114 (holding that the defendant traveled in foreign commerce by traveling from the United States to Cambodia).

171. *Ford v. United States*, 273 U.S. 593, 620 (1927); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355–56 (1909); *see also* 18 U.S.C. § 1201(a) (2012) (prohibiting the kidnapping of any person and transportation of that person in foreign commerce); 18 U.S.C. § 2423 (2012) (prohibiting travel in foreign commerce for the purpose of committing illicit sexual conduct abroad).

172. 135 S. Ct. 2076, 2095 (2015).

173. *Id.* at 2086.

174. *Id.* at 2094.

175. *Id.* at 2095.

176. *Id.* at 2094.

177. *Id.* at 2096.

178. *Id.* at 2083.

179. *Id.* at 2084 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring)).

imply that the President has the power to formally recognize foreign sovereigns.¹⁸⁰ Specifically, the majority determined that the text and structure of the Reception Clause, the Treaty Clause, and the Appointment Clause imply that the President has a recognition power.¹⁸¹ The Reception Clause directs that the President “shall receive Ambassadors and other public Ministers.”¹⁸² When the Constitution was ratified, the Court argued, it was commonly understood that receiving an ambassador was a de facto act of recognition.¹⁸³ Additionally, as a matter of constitutional structure, the President’s power over treaties and the appointment of public officials demonstrates that the President can engage in activities that may lead to recognition, such as nominating ambassadors and negotiating treaties.¹⁸⁴ In contrast, Congress has no constitutional power to initiate diplomatic relations with a foreign government.¹⁸⁵

The *Zivotofsky* Court next held that the President has the *exclusive* recognition power—including the power both to effect recognition and determine recognition policy.¹⁸⁶ The Court based this conclusion, first, on the fact that the President can effect recognition unilaterally in several different ways, while Congress cannot.¹⁸⁷ Second, the Court reasoned that functional considerations suggest that the recognition power is exclusively vested in the President.¹⁸⁸ Specifically, the United States must only have one policy with respect to whether a given government is legitimate because foreign countries need to know their status before entering into diplomatic relations or commerce with the United States.¹⁸⁹ Additionally, the Court argued, “Recognition is a topic on which the Nation must ‘speak . . . with one voice.’”¹⁹⁰ That voice, the Court explained, must be the President’s because his is the only branch that has the “characteristic of unity at all times.”¹⁹¹ Additionally, the President can engage in “the

180. *Id.* at 2085. Formal recognition is “formal acknowledgment that the entity possesses the qualifications for statehood.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. a (1987). The formal acknowledgment may be written, oral, or implied by concluding a treaty or receiving ambassadors. *Zivotofsky*, 135 S. Ct. at 2084.

181. *Id.* at 2085.

182. *Id.* (quoting U.S. CONST. art. II, § 3).

183. *Id.* at 2085. The majority noted that although the Reception Clause “received little attention at the Constitutional Convention,” scholars at that time wrote that “receiving an ambassador was tantamount to recognizing the sovereignty of the sending state.” *Id.* (citing EMMERICH DE VATTEL, THE LAW OF NATIONS § 78 (Philadelphia, T. & J.W. Johnson, 1852)).

184. *Id.* at 2085–86.

185. *Id.* at 2086.

186. *Id.* at 2094.

187. *Id.* at 2085–86 (explaining that the President may unilaterally effect recognition by dispatching or receiving an ambassador or directly engaging in diplomacy with a foreign nation).

188. *Id.*

189. *Id.*

190. *Id.* at 2086 (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003)).

191. *Id.*

delicate and often secret diplomatic contacts that may lead to a decision on recognition,” and can more easily take “decisive, unequivocal action necessary to recognize other states.”¹⁹²

Third, the Court argued that precedent supports its conclusion that the President’s recognition power is exclusive.¹⁹³ The Court began by acknowledging that virtually no binding legal precedent exists on the specific issue presented in *Zivotofsky*.¹⁹⁴ Although it has resolved disputes over the recognition power between the federal government and the states, and the judiciary and the political branches, the Court has never dealt with a conflict between the President and Congress.¹⁹⁵ The Court also noted, “some isolated statements in those cases lend support to the position that Congress has a role in the recognition process.”¹⁹⁶ Notwithstanding, the Court argued that Supreme Court precedent supports the conclusion that it is exclusive.¹⁹⁷ The Court pointed to *United States v. Pink*,¹⁹⁸ for example, which stated that the President has authority “to determine the policy which is to govern the question of recognition.”¹⁹⁹ The Court cited even stronger language in *Banco Nacional de Cuba v. Sabbatino*:²⁰⁰ “[p]olitical recognition is exclusively a function of the Executive.”²⁰¹ Conceding that the cases went both ways, the Court argued *Banco Nacional* further supported the conclusion that the President’s recognition power is exclusive.²⁰²

Fourth, the Court explained that since the ratification era, the President has unilaterally exercised the recognition power on many occasions and, for the most part, Congress has acquiesced.²⁰³ President Washington, the Court highlighted, unilaterally recognized the French revolutionary government in 1793 by receiving a French ambassador representing the new government.²⁰⁴ President Washington did not consult with Congress and

192. *Id.*

193. *Id.* at 2091.

194. *Id.* at 2088.

195. *Id.* (citing *United States v. Pink*, 315 U.S. 203 (1942) (federal government and the states); then citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (federal government and the judiciary)).

196. *Id.* at 2088.

197. *Id.*; see *supra* Part II.A.

198. 315 U.S. 230.

199. *Zivotofsky*, 135 S. Ct. at 2088 (quoting *Pink*, 315 U.S. at 229).

200. 376 U.S. 398.

201. *Id.* at 2089 (quoting *Banco Nacional de Cuba*, 376 U.S. at 410). The Court also relied on *National City Bank of New York v. Republic of China*, which held that “[t]he status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court.” 348 U.S. 356, 358 (1955).

202. *Zivotofsky*, 135 S. Ct. at 2088.

203. *Id.* at 2091.

204. *Id.* at 2091–92.

Congress did not protest the reception of the ambassador.²⁰⁵ Similarly, when President Carter recognized the People's Republic of China and derecognized the Republic of China, Congress did not challenge the President's exclusive authority to effect recognition.²⁰⁶ On occasion, the Court conceded, Congress and the President have acted together to recognize foreign sovereignties.²⁰⁷ The Court concluded, however, that for most of the twentieth century the President recognized new governments without any "serious opposition"²⁰⁸ from Congress, and there has been little debate that the power is exclusively vested in the President.²⁰⁹

Next, the Court held that Congress may not force the President to contradict an earlier statement on recognition.²¹⁰ The Court reasoned that, as a "matter of both common sense and necessity,"²¹¹ the President's exclusive recognition power includes not only the initial, formal recognition, but also subsequent statements by him and his agents on recognition.²¹² If Congress could override the President's recognition determination, the Court reasoned, the recognition power would be meaningless.²¹³ As such, the Court held that Congress may not enact a law that forces the President to contradict an act of recognition.²¹⁴

The *Zivotofsky* Court emphasized that the President has no greater authority to act in foreign affairs than he does on domestic issues.²¹⁵ The Court explained that although the President has a unique role in communicating with foreign governments, he is bound by laws that Congress enacts, which ensures that "the democratic will of the people is observed and respected in foreign affairs as in the domestic realm."²¹⁶ In accordance with this theory, the majority declined to adopt the Government's argument that *Curtiss-Wright* grants the President "broad,

205. *Id.* at 2092.

206. *Id.* at 2094.

207. *Id.* at 2091. The Court cited the recognition of the Republic of Texas in 1835, Liberia and Haiti in 1861, and the revolutionary government of Cuba in 1898 as examples where the President collaborated with Congress on acts of recognition. *Id.* at 2092–93.

208. *Id.* at 2093 (quoting Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 TEMP. L. REV. 1, 41 (2013)).

209. *Id.* at 2093–94.

210. *Id.* at 2095.

211. *Id.*

212. *Id.* at 2094–95.

213. *Id.*

214. *Id.* Sensing the breadth of its holding, the Court was careful to specify that although Congress is disabled from acting on the subject of recognition, the subject is "quite narrow"; it is limited only to formal recognition determinations. *Id.*; *see supra* note 180.

215. *Id.* at 2090 ("But whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law.")

216. *Id.* at 2088. Congress's role in foreign affairs, the Court explained, is essential because it is a check on presidential power. *Id.* at 2090. The Court stated, "The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue." *Id.*

undefined powers over foreign affairs.”²¹⁷ The Court also repeatedly stressed Congress’s essential role in formulating policy and enacting legislation in foreign affairs.²¹⁸ Moreover, the Court noted, ruling that the President has the exclusive recognition power does not leave the President with uncheckable power; if Congress disagrees with an act of recognition by the President, Congress may refuse to dispatch an ambassador or engage in commerce with that nation.²¹⁹ Congress may not, however, force the President to contradict an earlier statement on recognition.²²⁰

Finally, the *Zivotofsky* Court held that Section 214(d) unconstitutionally infringed on the President’s exclusive recognition power.²²¹ The provision, as written, entitles children born in Jerusalem to a U.S. passport stating that they were born in “Israel.”²²² According to the President and longstanding U.S. policy, however, children born in Jerusalem are not born in Israel.²²³ In this sense, the provision “directly contradicts” the President’s decision to withhold recognition of Jerusalem as belonging to any sovereign.²²⁴ For this reason, the *Zivotofsky* Court found Section 214(d) is unconstitutional, and it affirmed the decision of the Court of Appeals.²²⁵

Justice Breyer joined the majority, but filed a brief concurring opinion arguing that he believed the case presented a political question.²²⁶ Justice Thomas filed an opinion concurring in the judgment in part and dissenting in part.²²⁷ Justice Thomas agreed that Section 214(d) was unconstitutional, but disagreed with the Court’s reasoning.²²⁸ Sidestepping recognition

217. *Zivotofsky*, 135 S. Ct. at 2089. The Court added that, first, *Curtiss-Wright* dealt with whether a congressional delegation of power to the President was constitutional, and the broad-sweeping descriptions of unbounded power were dicta. *Id.* at 2090. Second, any pronouncement of presidential authority in foreign affairs beyond the recognition power would be unnecessary to resolve the issue in *Zivotofsky*. *Id.* at 2089.

218. *Id.* at 2087 (explaining that Congress has “substantial authority regarding many of the policy determinations that precede and follow the act of recognition itself”); *id.* at 2088 (“Congress has an important role in other aspects of foreign policy.”); *id.* at 2090 (“[I]t is essential that the congressional role in foreign affairs be understood and respected.”).

219. *Id.* at 2087.

220. *Id.* at 2095.

221. *Id.*

222. *Id.* at 2094.

223. *Id.*

224. *Id.*

225. *Id.* at 2096.

226. *Id.* (Breyer, J., concurring). Justice Breyer filed a dissenting opinion in the 2012 *Zivotofsky* case, arguing that the case presented a political question. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1437 (2012) (Breyer, J., dissenting). He was precluded from doing so again because that case, which held that *Zivotofsky* did *not* constitute a political question was now binding precedent. *Zivotofsky*, 135 S. Ct. at 2096 (Breyer, J., concurring) (citing *Zivotofsky*, 132 S. Ct. at 1437 (Breyer, J., dissenting)).

227. *Zivotofsky*, 135 S. Ct. at 2096 (Thomas, J., concurring).

228. *Id.* at 2097.

altogether, he argued that as a passport law, Section 214(d) fell within the President's "residual" foreign affairs power through Article II's Vesting Clause.²²⁹ In support of his argument, Justice Thomas pointed to historical evidence that the President has consistently controlled the issuance of passports since the ratification era.²³⁰ When Congress has enacted passport legislation, he argued, the laws have always been narrow in scope and acknowledged broad executive discretion on the subject.²³¹ Justice Thomas concluded that despite Zivotofsky's arguments to the contrary, Congress had no authority to enact Section 214(d) pursuant to its foreign commerce or naturalization powers, or through the Necessary and Proper Clause.²³²

Justice Thomas further argued that Section 214(d) did not implicate recognition because, essentially, Israel has already been recognized by the United States.²³³ The question of sovereignty over Jerusalem, in contrast, is a question of potential change to Israel's territory.²³⁴ He explained, "[I]stating a Jerusalem-born citizen's place of birth as 'Israel' cannot amount to recognition because the United States already recognizes Israel as an international person."²³⁵ In essence, Justice Thomas argued, the majority relied on a distorted definition of "recognition."²³⁶

Justice Scalia, joined by Chief Justice Roberts and Justice Alito, filed a dissenting opinion. Justice Scalia first argued that Congress had authority to enact Section 214(d) pursuant to its powers over naturalization.²³⁷ Congress's naturalization power, he argued, enables it to "furnish the people it makes citizens with papers verifying their citizenship."²³⁸ Next, Justice Scalia acknowledged that the Constitution grants the President power over recognition, but disputed that it was exclusive.²³⁹ Even if it did, Justice Scalia argued, Section 214(d) did not implicate recognition.²⁴⁰ The

229. *Id.* at 2101. Justice Thomas argued that certain powers are expressly enumerated to either or both political branches, and all "residual" foreign powers are vested in the President through Article II's Vesting Clause. *Id.*

230. *Id.* at 2101–02.

231. *Id.* at 2103.

232. *Id.* at 2104. Justice Thomas would have held, however, that Section 214(d) was constitutional with respect to the Consular Report of Birth Abroad. *Id.* at 2111. While the statute's application to passports was unconstitutional because it fell under the President's residual foreign affairs powers, Congress has authority over Consular Reports of Birth Abroad through its powers over naturalization. *Id.*

233. *Id.* at 2112.

234. *Id.*

235. *Id.*

236. *Id.* at 2112–13.

237. *Id.* at 2117 (Scalia, J., dissenting).

238. *Id.*

239. *Id.* at 2118.

240. *Id.*

statute does not “require the Secretary to make a formal declaration about Israel’s sovereignty over Jerusalem,” and thus should have been upheld.²⁴¹

Chief Justice Roberts, joined by Justice Alito, filed a separate dissenting opinion to highlight the majority’s “error on a basic question of separation of powers.”²⁴² Even if Section 214(d) implicated the recognition power, Chief Justice Roberts argued the President failed to demonstrate that his power is “so conclusive and preclusive” that it “disabl[es] the Congress from acting on the subject.”²⁴³ Turning first to the text, Chief Justice Roberts explained that the majority’s reliance on the Reception Clause is weak because receiving ambassadors is a duty, not a power.²⁴⁴ Additionally, the President’s other enumerated foreign powers are shared with Congress, which undermines the conclusion that the President’s recognition power is exclusive.²⁴⁵ Chief Justice Roberts next argued that the legal precedents consist only of “conflicting dicta,” and history points in both directions.²⁴⁶ And, while congressional acquiescence may provide guidance when the President acts without congressional authorization, here, the President acted contrary to a duly enacted statute.²⁴⁷ Ultimately, Chief Justice Roberts concluded that Section 214(d) did not warrant allowing the President to contravene an act of Congress in the field of foreign affairs for the first time in history.²⁴⁸

IV. ANALYSIS

In *Zivotofsky v. Kerry*, the Court held that the President had the exclusive power to determine recognition policy and effect recognition, and Congress could not force the President to contradict acts or statements of formal recognition.²⁴⁹ The Court further held that Section 214(d), although not a formal act of recognition, forced the President to contradict a formal statement of recognition.²⁵⁰ For these reasons, the statute was unconstitutional.

In addition to addressing the merits of Zivotofsky’s claims, the Court corrected two significant flaws promulgated by Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*²⁵¹ In doing so, the Court signaled a

241. *Id.*

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

243. *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring)).

244. *Id.* at 2113.

245. *Id.* at 2114.

246. *Id.*

247. *Id.*

248. *Id.* at 2116.

249. *Id.* at 2096 (majority opinion).

250. *See infra* Part IV.A.

251. *See infra* Part IV.A.

shift in the theoretical framework through which it analyzes foreign affairs cases implicating separation of powers.²⁵² Within this framework, the Court correctly held that the President has exclusive recognition power.²⁵³ The President's exclusive power to effect recognition fits uncontroversially under his broader authority as sole organ of communication with foreign governments.²⁵⁴ Regarding the President's power to determine recognition policy, the Court reached the correct conclusion but did not conduct a sufficiently exacting analysis.²⁵⁵ The Court should have concluded that the President has exclusive power to determine recognition policy through his residual foreign affairs power derived from the Vesting Clause of Article II.²⁵⁶

Although it correctly concluded that the President has exclusive power to effect recognition, the Court erred in holding that Section 214(d) was unconstitutional.²⁵⁷ First, in holding that Congress may not force the President to contradict his statements on recognition, the Court erroneously articulated a far-reaching rule that encompasses otherwise constitutionally enacted legislation.²⁵⁸ This rule too greatly infringes on Congress's lawmaking power, and represented an attempt to strike down legislation that compromised the United States' neutral policy towards Jerusalem at the cost of our system of separation of powers.²⁵⁹ Instead, the Court should have limited the scope of infringement only to other formal acts of recognition.²⁶⁰ Applying this rule, Section 214(d) would not have infringed on the President's exclusive recognition power.²⁶¹ Finally, the Court should have concluded that Section 214(d) is constitutional pursuant to Congress's authority under the Foreign Commerce Clause.²⁶²

A. The Court Properly Rejected Curtiss-Wright's Theory of Inherent Power and Set Forth a Balanced Theory of Division of Powers Between Congress and the President in Foreign Affairs

In *Zivotofsky*, the Court seized an opportunity to reject *Curtiss-Wright's* flawed theory of inherent power. On its face, the text of the opinion appears to do nothing more than distinguish *Curtiss-Wright* on its

252. *See infra* Part IV.B.

253. *See infra* Part IV.B.

254. *See infra* Part IV.B.

255. *See infra* Part IV.B.

256. *See infra* Part IV.B.

257. *See infra* Part IV.D.

258. *See infra* Part IV.C.

259. *See infra* Part IV.C.

260. *See infra* Part IV.C.

261. *See infra* Part IV.C.

262. *See infra* Part IV.D.

facts.²⁶³ The Court went out of its way, however, to affirmatively dismiss *Curtiss-Wright*'s dangerous theory of inherent power and correct Justice Sutherland's misinterpretation of Chief Justice John Marshall's sole organ theory. The Court did this by stressing that the President's power is no greater in foreign affairs than in domestic,²⁶⁴ and that Congress has an important role in formulating and implementing foreign policy.²⁶⁵ Additionally, it correctly cited Chief Justice John Marshall's "sole organ" speech as acknowledging the President's "unique role in communicating with foreign governments" and not as a source of inherent power.²⁶⁶ These aspects of the *Zivotofsky* opinion show an attempt by the Court to shift the theoretical framework through which it decides foreign affairs cases to a more balanced division of power between Congress and the President.

Curtiss-Wright's first great flaw is Justice Sutherland's argument that the President's inherent power to conduct foreign affairs derives from a source outside the Constitution.²⁶⁷ This theory is incorrect for two reasons. First, commentators have refuted Justice Sutherland's theory that power over foreign affairs passed directly from the British Crown to the federal government and not the states.²⁶⁸ Soon after declaring independence, in fact, Congress affirmatively allocated British "sovereignty" to the states—not the federal government—and specified that each state retained every power not expressly delegated to the central government.²⁶⁹ Moreover, in the years between declaring independence and ratifying the Constitution, the states were active in foreign affairs.²⁷⁰ Individual states engaged in foreign trade, signed treaties, and sought to borrow money from other countries.²⁷¹ In addition to this historical evidence, Professor Louis Henkin points out that the text of both the Articles of Confederation and the Constitution deny states key foreign affairs powers.²⁷² If the states never

263. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2089 (2015) (distinguishing *Curtiss-Wright* because it involved the constitutionality of a congressional delegation of power, which was irrelevant to *Zivotofsky*).

264. *Id.* at 2090; *see supra* note 215.

265. *See supra* note 218.

266. *Zivotofsky*, 135 S. Ct. at 2090.

267. *See supra* notes 117–121 and accompanying text.

268. *See infra* notes 269–271.

269. Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 16 (1973). Professor Lofgren argues, "[f]or Sutherland . . . another government was evidently the only possible source for these powers of sovereignty." *Id.* at 14.

270. LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 107–08 (6th rev. ed. 2014).

271. David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 486 (1946).

272. U.S. CONST. art. I, § 10. Article I, § 10 prohibits the states from entering into treaties, entering into agreements with foreign countries, taxing imported goods, and keeping troops or ships during a time of peace. *Id.*; *see also* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 151–52 (2nd ed. 1996) (discussing the Constitution's express denial and implicit

had the power to participate in foreign affairs, these limitations would be redundant.²⁷³

The second reason that Justice Sutherland's inherent powers theory is incorrect is because, simply, the theory is inconsistent with the most fundamental principle of United States government: all authority derives from the Constitution's enumerated powers, and implied powers "reasonably drawn" from enumerated powers.²⁷⁴ Inherent power, in contrast, is not drawn from the Constitution, and is thus not subject to its carefully placed limitations.²⁷⁵ A fundamental purpose of the Constitution, drafted when monarchical prerogative and tyranny were recent memories, is to limit the abuse of government power.²⁷⁶ The Constitution does this by containing all of its powers within its text, which consists of express or implied grants of power stripped from the states and the people of the United States and vested in the federal government.²⁷⁷ Claims of power not subject to constitutional limitations are more akin to tyranny than a democratic system of government.

Curtiss-Wright's second great flaw is Justice Sutherland's skewed interpretation of John Marshall's sole organ theory.²⁷⁸ On March 7, 1800, then-Congressman John Marshall argued on the floor of the House of Representatives that the President was the "sole organ of the nation in its external relations, and its sole representative with foreign nations."²⁷⁹ Commentators nearly unanimously agree that John Marshall was describing the President as the sole organ for *communication* with foreign

limitations on state involvement in foreign affairs); MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 33 (2007) (arguing that the Articles of Confederation do not suggest an inherent foreign affairs power).

273. RAMSEY, *supra* note 272, at 21. Professor Ramsey also discusses *The Federalist* as an example of ratification era commentary that framed foreign affairs in terms of delegated powers, not inherent powers. *Id.* at 24.

274. FISHER, *supra* note 270, at 18; HENKIN, *supra* note 272, at 25. That implied powers are necessary for the proper functioning of government traces back to *McCulloch v. Maryland*. 17 U.S. (4 Wheat.) 316, 407 (1819). In *McCulloch*, Chief Justice Marshall stated that a constitution that enumerated every power of government "would partake of the prolixity of a legal code." *Id.* Instead, "its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects *be deduced from the nature of the objects themselves.*" *Id.* (emphasis added).

275. FISHER, *supra* note 270, at 18.

276. HENKIN, *supra* note 272, at 27–28.

277. RAMSEY, *supra* note 272, at 13. Professor Ramsey argues that the Tenth Amendment is textual evidence that governmental power is either reserved to the states or the people, or delegated to the federal government. *Id.* at 18. He quickly points out, however, that this argument may be insufficient: "Sutherland in effect argued that the Tenth Amendment's language cannot be taken literally, because the Constitution's drafters had a background understanding that foreign affairs powers *could not* be delegated (because the states never possessed them) and *could not* be reserved (for the same reason)." *Id.* at 19.

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

279. 10 ANNALS OF CONG. 613 (1800).

governments, not the President's inherent power to conduct foreign policy.²⁸⁰ By manipulating the meaning of John Marshall's speech, however, Justice Sutherland concluded that the President was the "sole organ of the federal government in the field of international relations."²⁸¹ As has already been discussed, this mischaracterization of presidential power led to a significantly expanded view of this power after *Curtiss-Wright*.²⁸²

The issue in *Zivotofsky* did not require that the Court right the wrongs of *Curtiss-Wright*. It could have omitted its entire discussion of *Curtiss-Wright*, excluded its correction of Chief Justice John Marshall's speech, and skipped its clarification that the President has no greater power in foreign affairs than it has in domestic. The Court's holding, as discussed below, would still be primarily theoretical. The Court recognized, however, that it had a chance to correct more than seventy-five years of problematic theory pervading its foreign affairs jurisprudence. In taking this opportunity, the *Zivotofsky* Court appropriately "decline[d] to acknowledge [the] unbounded power" of *Curtiss-Wright*, signaling a shift in the theoretical framework for deciding foreign affairs-separation of powers cases towards a more balanced division of power between Congress and the President.²⁸³

B. The President Has the Exclusive Recognition Power

Within the foregoing theoretical framework, the *Zivotofsky* Court correctly held that the President has the exclusive recognition power. The Court divided the recognition power into two components: the power to effect recognition,²⁸⁴ and the power to determine recognition policy.²⁸⁵

280. HENKIN, *supra* note 272, at 41; Louis Fisher, *The Law: Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRESIDENTIAL STUD. Q. 37, March 2007, at 139, 142; Kimberly L. Fletcher, *The Court's Decisive Hand Shapes the Executive's Foreign Affairs Policymaking Power*, 73 MD. L. REV. 247, 259 (2013); Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 YALE J. INT'L L. 5, 10 (1988). Only four years after this speech, John Marshall penned *Little v. Barreme* as Chief Justice, further evidence he did not intend to convey that the President had inherent power to conduct foreign affairs in his "sole organ" speech. Glennon, *supra* note 280. After all, *Little* held that the President, even during a time of war, could only exercise power pursuant to an act of Congress. 6 U.S. (2 Cranch) 170, 177 (1804).

281. *Curtiss-Wright*, 299 U.S. at 320. Professor Fisher points out a logical misstep between using Justice Sutherland's argument, and he concludes that the President's power in foreign affairs is exclusive: "Even if the power of external sovereignty had somehow passed intact from the Crown to the 'United States,' the Constitution divides that power between Congress and the President." FISHER, *supra* note 270, at 108.

282. See *supra* notes 129 & 132 and accompanying text.

283. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2089 (2015).

284. *Id.* at 2094.

285. See *id.* at 2090 ("[J]udicial 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.").

Regarding the President's power to effect recognition, or "announce" recognition policy, the Court's dispositive reasoning was that the United States must speak with "one voice" on issues of recognition, and that voice must be the President's.²⁸⁶ This reasoning has its theoretical roots in the widely accepted proposition that it is the sole domain of the President to communicate with foreign nations.²⁸⁷ The Court reached the correct conclusion on this aspect of the holding because the power to effect recognition fits neatly within the President's role as sole organ of communication with other governments.

Regarding the President's power to determine recognition policy, the Court reached the correct conclusion but failed to subject the issue to a sufficiently demanding inquiry. The extent to which the President may unilaterally determine foreign policy strikes at the heart of an ongoing and unresolved debate over separation of powers in foreign affairs.²⁸⁸ When the Court allocates policymaking power to one political branch over the other, it must do so carefully. For its part, the Court correctly inferred from the President's longstanding practice of unilaterally determining recognition policy that he has that exclusive power—but this reasoning was not enough. The President does, however, have the exclusive power to determine recognition policy because it falls within his "residual foreign affairs power" under Article II's Vesting Clause.

For most of United States history, courts and commentators have viewed the President as the sole organ of communication with foreign nations.²⁸⁹ Professor Louis Henkin argued that this power is to be inferred from the President's control over the "foreign affairs apparatus."²⁹⁰ Article II, for example, provides that the President shall appoint "Ambassadors, other public Ministers and Consuls."²⁹¹ By way of this power, "those

286. *Id.* at 2086 (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 (2003)).

287. *See supra* note 103; *see infra* note 289.

288. *See infra* notes 294–306 and accompanying text.

289. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1984*, at 214 (Randall W. Bland et al. eds., 5th rev. ed. 1984) ("[T]here is no more securely established principle of constitutional practice than the exclusive right of the President to be the nation's intermediary in its dealing with other nations."); HENKIN, *supra* note 272, at 42 ("That the President is the sole organ of official communication by and to the United States has not been questioned and has not been a source of significant controversy."); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L. J.* 231, 233 (2001) ("It is conventional wisdom that the President is, at minimum, the 'sole organ' of communication with foreign nations . . ."); *see supra* note 103. Only recently has scholarship appeared criticizing the constitutional moorings of the sole organ doctrine. *See, e.g.*, Sarah H. Cleveland, *Crosby and the "One-Voice" Myth in U.S. Foreign Relations*, 46 *VILL. L. REV.* 975, 975 (2001) ("The 'one-voice' doctrine is a myth."); David H. Moore, *Beyond One Voice*, 98 *MINN. L. REV.* 953, 955 (2014) (arguing that the sole organ doctrine's "contributions are outweighed by its wide-ranging flaws").

290. HENKIN, *supra* note 281, at 41.

291. U.S. CONST. art. II, § 2.

whom [the President] appoints report and are responsible to him; he directs and instructs them, and determines what they shall communicate and what they shall withhold.”²⁹² Additionally, the President has broad authority to engage in diplomacy and negotiate treaties.²⁹³ As is argued in greater depth below, Professors Prakash and Ramsey posit a different textual basis for the President’s sole organ power: Article II’s Vesting Clause affirmatively grants the President “residual power” over foreign affairs, which includes the sole power over communication with other nations.²⁹⁴

Originalist evidence demonstrates that Chief Justice John Marshall was not the only ratification-era proponent of the sole organ theory. James Madison, who advocated for an executive branch tightly controlled by the legislative branch, still believed that the President’s chief role in foreign affairs was as an “instrument” of the national legislature.²⁹⁵ The Washington administration, moreover, “asserted and enjoyed a monopoly on foreign communications.”²⁹⁶ In fact, Congress requested that the Washington administration forward congressional communications to foreign nations instead of doing so itself.²⁹⁷ Carrying forward this ratification-era practice, the Supreme Court has emphasized the primacy of the President’s role as sole organ of communication.²⁹⁸

The President’s power to effect recognition fits appropriately within the scope of this power. Recognition is “formal acknowledgment that the entity possesses the qualifications for statehood.”²⁹⁹ To effect recognition is to make a formal acknowledgment, which can be written, oral, or implied by concluding a treaty or receiving ambassadors.³⁰⁰ Therefore, by its very nature, the act of effecting recognition is a communicative act. For this reason, the President’s role as sole organ of communication with foreign nations naturally encompasses the power to effect recognition. The *Zivotofsky* Court, arguing that the President must be the sole voice of United States’ recognition policy, correctly nested the President’s exclusive power to effect recognition within the President’s sole organ power.

292. HENKIN, *supra* note 272, at 41–42. The *Zivotofsky* Court listed similar considerations as “traditional avenues of recognition,” in support of its argument that the President has the exclusive recognition power. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015).

293. HENKIN, *supra* note 272, at 88. *But see* FISHER, *supra* note 270, at 249 (“[T]he negotiation of treaties has often been shared with the Senate in order to secure legislative understanding and support.”).

294. Prakash & Ramsey, *supra* note 289, at 323.

295. CORWIN, *supra* note 289, at 210.

296. Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1673 (2005).

297. *Id.*

298. *See supra* note 103.

299. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. a (1987).

300. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015).

While the power to *effect* recognition fits uncontroversially within the President's sole organ power, the President's power to *determine recognition policy* implicates a wholly unsettled debate.³⁰¹ In *Zivotofsky*, the Court aggregated its analysis of the power over recognition policy with the power over effecting recognition. The Court should have subjected the question to a more rigorous inquiry. If it had, this Note argues that the Court would have concluded that the President has the exclusive power to determine recognition policy through Article II's Vesting Clause.

The Vesting Clause theory holds that Article II's Vesting Clause, which vests the "executive power" in the President, is an affirmative grant of power.³⁰² The argument most famously originates with Alexander Hamilton during the Pacificus-Helvidius debates.³⁰³ Hamilton, writing as Pacificus, argued that Article II's Vesting Clause vests not only the duty to execute legislation, but also comprehends "the whole of Executive Power" as it was defined at that time.³⁰⁴ Hamilton's theory, based on the writings of Montesquieu, Locke, and Blackstone, held that the executive power included "independent, major, substantive powers to 'determine the condition of the nation in its foreign relations.'"³⁰⁵ Further, the President has "all powers that the facts of international intercourse may at anytime make conveniently applicable if the Constitution does not vest them elsewhere in clear terms."³⁰⁶

The Vesting Clause, in the first instance, is rooted in the text of the Constitution. Both Articles I and II have vesting clauses, but the two are distinct: Article I's Vesting Clause vests Congress with all legislative powers "herein granted,"³⁰⁷ but Article II's Vesting Clause omits those words.³⁰⁸ Today, this distinction permits the inference that Congress may exercise powers only pursuant to those enumerated, and the President is not subject to that limitation.³⁰⁹ During the ratification era, however, the distinction did not depend on inference: it was commonly understood that

301. See, e.g., HENKIN, *supra* note 272, at 42–43 ("Issues begin to burgeon when the President claims authority, as 'sole organ', to . . . determine also the content of the communication . . ."); Prakash & Ramsey, *supra* note 289, at 251 ("Modern scholarship has thus been unable to address satisfactorily the question whether the President's foreign affairs powers include some lawmaking authority.").

302. U.S. CONST. art. II, § 1, cl. 1.

303. CORWIN, *supra* note 289, at 209–10.

304. HENKIN, *supra* note 272, at 39.

305. *Id.*

306. CORWIN, *supra* note 289, at 209–10.

307. U.S. CONST. art. I, § 1, cl. 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . .").

308. U.S. CONST. art. I, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

309. JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 18 (2005); Prakash & Ramsey, *supra* note 289, at 256–57.

the “executive power” included broad authority over foreign affairs.³¹⁰ From this originalist interpretation of “executive power,” modern proponents of the Vesting Clause theory argue that the President—prior to ratification—had a general power over foreign affairs.³¹¹ When the Framers drafted the Constitution, they stripped some powers from the President’s “executive power” and enumerated them in Article I.³¹² As a result, the President is precluded from regulating foreign commerce, declaring war, or making laws related to foreign affairs, and cannot enter into treaties or appoint public officials without the consent of Congress.³¹³ What remains of the President’s residual foreign affairs power in Article II’s Vesting Clause, however, permits the President to “set and announce the foreign policy of the federal government.”³¹⁴ Indeed, the Vesting Clause theory explains many conspicuous silences in the Constitution relating to foreign affairs.³¹⁵

Pursuant to the President’s residual foreign affairs power, he has the exclusive power to determine recognition policy.³¹⁶ Historical practice reflects this. In 1793, President George Washington conferred with his cabinet on the question of whether he should receive a diplomat from the post-revolution government of France.³¹⁷ The cabinet agreed, and Washington received the French Ambassador “without consultation with or direction from Congress.”³¹⁸ Since that time, the President has unilaterally determined recognition policy for most of United States’ history.³¹⁹ On most occasions, the President has unilaterally determined recognition policy towards a foreign sovereign and then effected the recognition without consulting Congress.³²⁰ Much less often Congress and the President have collaborated on a recognition issue, and only four times in history has

310. YOO, *supra* note 309, at 36–45; Prakash & Ramsey, *supra* note 289, at 266.

311. Prakash & Ramsey, *supra* note 289, at 252.

312. *Id.* at 355.

313. *Id.* at 261.

314. *Id.* at 355.

315. Justice Thomas relied on a Vesting Clause argument in his concurring opinion. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2097–101 (2015) (Thomas, J., concurring).

316. FISHER, *supra* note 270, at 270 (“The President has constitutional authority to recognize foreign governments . . .”); HENKIN, *supra* note 272, at 43 (“It is no longer questioned that the President does not merely perform the ceremony of receiving foreign ambassadors but also determines whether the United States should recognize or refuse to recognize a foreign government.”).

317. RAMSEY, *supra* note 272, at 78.

318. *Id.*

319. Robert J. Reinstein, *Is the President’s Recognition Power Exclusive?*, 86 TEMP. L. REV. 1, 51 (2013).

320. David Gray Adler, *The President’s Recognition Power*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 133, 133–34 (David Gray Adler & Larry N. George eds., 1996); CORWIN, *supra* note 289, at 219.

Congress unilaterally exercised the recognition power.³²¹ Though longstanding practice is not conclusive evidence of constitutionality, it is “weighty” evidence of constitutionality.³²² It is also indicative of the President’s institutional competence to exercise the power. As Professor Harold Koh explains, Congress is “poorly structured for initiative and leadership” because it is a bicameral institution made up of individuals, each subject to pressure from geographically dispersed power bases.³²³ The President, in contrast, can act “swiftly and secretly to respond to fast-moving international events.”³²⁴

Thus, although the Court erred in aggregating the analysis of the President’s power to determine recognition policy with the President’s power to effect recognition, the Court correctly concluded that the President has the exclusive authority to exercise the recognition power.

C. Section 214(d) Does Not Infringe on the President’s Recognition Power

After the *Zivotofsky* Court defined the scope of the recognition power, it held that Congress cannot force the President to “contradict his own statement[s] regarding a determination of formal recognition.”³²⁵ The Court’s key reasoning for this conclusion was that the President’s recognition power was sufficiently exclusive that it “disabl[es] the Congress from acting upon the subject.”³²⁶ In “disabling” Congress, the Court invoked Justice Jackson’s exception to Category Three, reserved for “conclusive and preclusive” claims to Presidential power.³²⁷

The Court erred, however, in promulgating so broad a rule on infringement. First, the Court’s holding too greatly invades Congress’s lawmaking power by prohibiting otherwise constitutional acts of

321. Reinstein, *supra* note 319.

322. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970)).

323. Harold Hongju Koh, *Why the President Almost Always Wins in Foreign Affairs*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY*, *supra* note 320, at 158, 159.

324. *Id.* at 162. Professor Koh also points out that the President may feel pressure to act quickly and unilaterally because he is accountable to the electorate. *Id.* at 159; *see also* CORWIN, *supra* note 289, at 201; HENKIN, *supra* note 272, at 32 (“Unlike Congress, the President is always ‘in session.’ He can act quickly, informally, and secretly.”).

325. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015).

326. *Id.* at 2095 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring)). Recall that the parties in *Zivotofsky* agreed that because the President refused to implement Section 214(d), his power fell into Justice Jackson’s third category of presidential power, and therefore was at its “lowest ebb.” *Id.* at 2084.

327. *See id.* at 2095 (“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 As a result it is unconstitutional.”).

Congress.³²⁸ Second, the rule's intention of preventing Congress from undermining an act of recognition is shortsighted because Congress can undermine an act of recognition by acting outside the scope of the rule. The rule on infringement too greatly invades Congress' lawmaking power for too little benefit. The Court should have instead limited the circumstances of infringement only to formal acts of recognition, thus "disabling" Congress from exercising formal recognition. Because Section 214(d) is not an act of formal recognition, the Court should have held that the statute does not infringe on the President's recognition power.

The *Zivotofsky* Court attempts to make a distinction between acts of Congress that express disagreement with a President's act of recognition,³²⁹ and acts of Congress that force the President to contradict his own statements regarding recognition.³³⁰ The Court implies that this distinction matters because if Congress forces the President to contradict an act of recognition, the recognized country may construe its legitimacy to the United States government as equivocal.³³¹ Such equivocation concerned the Court, presumably, because it would undermine the President's initial act of recognition and could endanger international relations. The Court concedes, however, that Congress is free to "express its disagreement" with an act of recognition by acting or refusing to take action in accordance with its Article I powers, such as refusing to confirm an ambassador, ease trade restrictions or consent to a treaty.³³² The Court admits that Congress expressing disagreement in this way would also undermine a President's act of recognition.³³³

The assumption underlying this distinction is that an act of Congress undermining a recognition policy *clearly originating from Congress* was tolerable, but an act of Congress undermining a recognition policy *ultimately voiced by the President*, somehow, so significantly undermines a recognition policy that it should be prohibited. This subtle difference is noted, but it fails to account for the fact that Congress could severely undermine an act of recognition pursuant to a valid exercise of power—at least according to the *Zivotofsky* Court. For example, Congress could declare war on the country at issue, or refuse to enter into a trade agreement.³³⁴ It is difficult to understand how a statute allowing U.S.

328. The Court's holding necessarily and specifically refers to otherwise constitutionally enacted legislation because the only alternative interpretation—Congress may not enact independently *unconstitutional* legislation that forces the President to contradict a statement of recognition—need not be stated.

329. *Zivotofsky*, 135 S. Ct. at 2087.

330. *Id.* at 2090.

331. *Id.* at 2086.

332. *Id.* at 2095.

333. *Id.*

334. *Id.*

citizens born in Jerusalem to choose to have “Israel” recorded as the birthplace on their passports more detrimentally undermines a recognition policy than other actions that Congress could take. The Court’s rule, which seeks to protect the President’s recognition policies and United States foreign relations, does not account for this disparity in reasoning.

Professor Robert Reinstein’s discussion of sole executive agreements with foreign governments illustrates the danger of allowing presidential power to trump otherwise constitutional legislation.³³⁵ He explains that, like the recognition power, sole executive agreements have no clear textual basis in the Constitution.³³⁶ Nevertheless, the President has regularly entered into sole executive agreements with foreign nations such that, when unchallenged, it is assumed that the President has the implied authority to do so.³³⁷ When a sole executive agreement conflicts with federal law, however, federal law has always prevailed, indicating that despite the implied power, the President cannot “displace or override the legislative powers of Congress.”³³⁸ Under this reasoning, the President should not be able to contravene a statute even if it contradicts a statement on recognition. After all, it is the President’s duty to “take Care that the Laws be faithfully executed.”³³⁹ Therefore, the Supreme Court should not have created an exception for the recognition power. As Chief Justice Roberts pointed out, the Court took “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.”³⁴⁰

The *Zivotofsky* Court appeared to disregard Justice Jackson’s admonition that “what is at stake is the equilibrium established by our constitutional system.”³⁴¹ Although the President’s recognition power is both “conclusive and preclusive,” the Court went too far in defining how it could “disable” Congress from acting. Instead, the Court should have limited its rule of infringement to only an exercise of the recognition power by any branch of the government besides the President. By effectively prohibiting otherwise constitutional legislation that falls in the Court’s new category of “forced contradictory statements,” the Court unconstitutionally strips away Congress’s lawmaking authority and expands the President’s power over recognition. In doing so, the Court undermined its own

335. Reinstein, *supra* note 319, at 53–54.

336. *Id.* at 53.

337. *Id.*

338. *Id.* at 54; *see also id.* at 54 n.364.

339. U.S. CONST. art. II, § 3.

340. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2116 (2015) (Roberts, C.J., dissenting).

341. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

assurances that Congress has a role to play in foreign affairs and, ultimately, backslid toward *Curtiss-Wright*.³⁴²

*D. Congress Had Constitutional Authority to Enact Section 214(d)
Under the Foreign Commerce Clause*

Zivotofsky brought suit to enforce Section 214(d). Because Section 214(d) does not infringe on the recognition power, the Court should have addressed whether Congress had authority to enact the statute. As discussed above, the Supreme Court has not directly addressed Congress's constitutional authority to enact passport legislation.³⁴³ Congress has, however, enacted legislation relating to passport regulation for more than two centuries, and, in the vast majority of cases involving such legislation, the Court has assumed Congress has the authority to do so.³⁴⁴ Even in *Zivotofsky*, the Court expressly acknowledged that it did not "question the power of Congress to enact passport legislation of wide scope," pursuant to the "extensive lawmaking power the Constitution vests in Congress over the Nation's foreign affairs."³⁴⁵ While longstanding practice is not conclusive evidence of constitutionality,³⁴⁶ the strong inference that may be gleaned from Congress's ongoing practice of enacting passport legislation is that it has *some* authority to do it.³⁴⁷

This Part argues that Congress has that authority under the Foreign Commerce Clause. The *Zivotofsky* Court could have easily upheld Section 214(d) as a proper exercise of congressional power under the Foreign Commerce Clause.³⁴⁸ The statute, which concerns the place of birth of a passport bearer, regulates the content of passports, which in turn regulates human movement through channels of foreign commerce. Additionally, passports are instruments of foreign commerce.³⁴⁹

Lower courts have held that a person traveling internationally is "traveling in foreign commerce." In *United States v. Clark*,³⁵⁰ the Ninth Circuit addressed the constitutionality of a statute prohibiting a person who "travels in foreign commerce" from engaging in "illicit sexual conduct with another person."³⁵¹ The court explained that "travels in foreign commerce" unambiguously invokes the Foreign Commerce Clause, and by traveling by

342. *See supra* note 218.

343. *See supra* note 161 and accompanying text.

344. *See supra* note 162 and accompanying text.

345. *Zivotofsky*, 135 S. Ct. at 2096 (majority opinion).

346. HENKIN, *supra* note 272, at 45.

347. *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (holding that a 200-year-old practice is evidence of constitutionality).

348. U.S. CONST. art. I, § 8, cl. 3.

349. *See infra* note 360 and accompanying text.

350. 435 F.3d 1100 (9th Cir. 2006).

351. *Id.* at 1104 (quoting 18 U.S.C. § 2423(c) (2012)).

plane from the United States to Cambodia, the defendant satisfied the “travels in foreign commerce” element of the statute.³⁵² The Fifth Circuit, too, has explained, “Congress intended foreign commerce to mean travel to or from, or at least some form of contact with, a foreign state.”³⁵³

The Ninth Circuit’s decision in *Clark* has sparked debate over the reach of the Foreign Commerce Clause.³⁵⁴ The focus of the criticism, however, is not whether traveling internationally, or through “channels of foreign commerce,” is sufficient to invoke the Foreign Commerce Clause.³⁵⁵ Instead, *Clark*’s holding is controversial because it grants Congress jurisdiction over conduct in foreign countries *after* the individual’s use of the channel of foreign commerce has ceased.³⁵⁶ Describing “travel in foreign commerce” as a “jurisdictional hook,” commentators caution that courts should not so broadly define the Foreign Commerce Clause such that it extends to all conduct in foreign nations.³⁵⁷ Notably, the commentators do not challenge Congress’s authority to regulate foreign travel by regulating foreign travel itself.³⁵⁸

Passport regulation falls squarely within Congress’s power to regulate people traveling through channels of foreign commerce. Under federal law, a person may not enter or exit the United States without a valid passport.³⁵⁹ By controlling who can enter and exit the country, passport regulation is the direct regulation of people engaging in foreign travel. The implications of passport regulation, moreover, are not as controversial as the statute in *Clark*; passports regulate human travel through channels of foreign commerce, and have little to do—if anything—with human conduct in foreign countries after the travel has ceased. In this sense, passport regulation is relatively insular—it concerns a travel document that serves as identification specifically intended to facilitate the safe journey of United States citizens through channels of foreign commerce. Moreover, the

352. *Id.* at 1114.

353. *United States v. Montford*, 27 F.3d 137, 139–40 (5th Cir. 1994).

354. See Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 999 (2010) (arguing that the statute in *Clark* does not establish a sufficient nexus between foreign travel, which is subject to the foreign commerce power, and illegal conduct subsequent to that travel, which is not necessarily within the foreign commerce power); Julie Buffington, Note, *Taking the Ball and Running With It: U.S. v. Clark and Congress’s Unlimited Power Under the Foreign Commerce Clause*, 75 U. CIN. L. REV. 841, 858 (2006) (arguing that Congress should not have broader power to regulate conduct abroad pursuant to the Foreign Commerce Clause than it has in regulating citizen’s interstate conduct).

355. Colangelo, *supra* note 354, at 997.

356. *Id.*

357. See *id.* at 999–1000 (“To uphold Section 2423(c) on a channels-of-commerce theory therefore is a radical move, and would mean that any time a U.S. citizen or permanent resident travels in foreign commerce, every subsequent act by that individual is within Congress’s regulatory authority.”).

358. *Id.* at 997.

359. 8 U.S.C. § 1185 (2012).

passport book itself is an instrumentality of foreign commerce. The Eleventh Circuit has defined instrumentalities of interstate commerce as “the people and things moving in commerce,” including cars, airplanes, boats, pagers, telephones, mobile phones and shipments of goods.³⁶⁰ Just as a car, airplane or boat is means that facilitate a person’s travel through channels of foreign commerce, so, too, is a passport.

Turning to Section 214(d) specifically, the statute is passport legislation that falls within the scope of the Foreign Commerce Clause. The statute, which allows a United States citizen born in Jerusalem to designate his or her place of birth as “Israel,” independently passes constitutional muster because it regulates an aspect of the passport that relates to the identity of the bearer. Determining the identity of a passport bearer directly relates to the passport’s purpose of safe and effective regulation of people moving through channels of foreign commerce. According to the State Department Foreign Affairs Manual, the “place of birth” designation is an integral part of establishing an individual’s identity.³⁶¹ It distinguishes that individual from other persons with similar names and/or dates of birth, and helps identify claimants attempting to use another person’s identity.³⁶² The information also facilitates retrieval of passport records that assists the Department in determining citizenship or notifying next of kin in case of emergency.³⁶³ Thus, as the State Department acknowledges, the birthplace of a passport bearer is integral to the safe international travel of United States citizens.³⁶⁴

One might argue that Section 214(d) does not have the objective of regulating foreign commerce; after all, the name of the section of the provision is “United States Policy with Respect to Jerusalem as the Capital of Israel.”³⁶⁵ The Supreme Court has held, however, that if Congress is directly regulating foreign commerce or an instrumentality of foreign commerce, Congress’s objective of the legislation is irrelevant.³⁶⁶ In

360. *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005).

361. U.S. DEP’T OF STATE, 7 FAM § 1310(g) app. D (2015), <https://fam.state.gov/FAM/07FAM/07FAM1300apD.html>.

362. *Id.*

363. *Id.*

364. *See also* Eugene Kontorovich, *The Article I Power in Zivotofsky v. Kerry*, WASH. POST (Oct. 30, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/30/the-article-i-power-in-zivotofsky-v-kerry/> (arguing that the “place of birth” field on passports is to help repatriate and protect Americans while traveling).

365. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1365–1366 (2002).

366. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (holding that although the “fundamental object” of the statute at issue was to vindicate racial discrimination in public accommodations, the statute was a valid exercise of the commerce power); *United States v. Darby*, 312 U.S. 100, 114–15 (1941) (upholding the Fair Labor Standards Act as a proper exercise of the commerce power despite its principal purpose as discouraging substandard labor conditions).

United States v. Darby,³⁶⁷ the Court declared, “Whatever their motive and purpose, regulations of commerce which do not infringe on some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.”³⁶⁸ Under this reasoning, even if Section 214(d) does not advance a specific foreign commerce objective, it is constitutional if it regulates foreign commerce and does not infringe on some other constitutional limitation. The statute, as has been established, directly regulates information pertaining to the identification of its bearer, which has integral importance to the effective regulation of people traveling through channels of foreign commerce. Thus, regardless of whether the birthplace designation on a person’s passport promotes foreign commerce, it directly regulates the channels of foreign commerce by controlling who can pass through them. To conclude, Congress had proper authority under the Foreign Commerce Clause to enact Section 214(d).

V. CONCLUSION

In *Zivotofsky v. Kerry*, the Supreme Court struck down Section 214(d) as an unconstitutional invasion of the President’s exclusive recognition power.³⁶⁹ Lacking doctrine to guide its analysis, the Court relied primarily on theoretical principles to reach its decision.³⁷⁰ Specifically, the Court rejected the pervasive dicta of *United States v. Curtiss-Wright Export Corp.*, edging the theoretical framework to a more balanced division of power.³⁷¹ On the merits, the Court held that the President had the exclusive recognition power, citing the need for the nation to speak with “one voice” on issues of recognition.³⁷² Additionally, the Court concluded that Congress could force the President to contradict statements on recognition.³⁷³ Though the Court reached the correct conclusion on the issue of recognition, it erred on defining what constitutes infringement of the recognition power. In a thinly veiled attempt to extend the reach of the recognition power to Section 214(d), the Court unconstitutionally stripped some of Congress’s lawmaking powers. Despite the Court’s efforts to correct the wrongs of *Curtiss-Wright*, the Court failed to live by its own lesson. Ultimately, the Court should have upheld Section 214(d) and ordered the State Department issue a passport to Zivotofsky with his birthplace recorded as “Israel.”

367. 312 U.S. 100 (1941).

368. *Id.* at 115.

369. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083 (2015).

370. *See supra* Part IV.A.

371. *See supra* Part IV.A.

372. *Zivotofsky*, 135 S. Ct. at 2087.

373. *Id.* at 2090.

Section 214(d) is inarguably troublesome. It contradicts longstanding United States policy as to the status of Jerusalem, and will likely be interpreted by some as an equivocation on our policy. The goal of this Note is not to discount the sensitivity of the political climate in the Middle East, nor to advocate for any change in the government's policy with respect to Jerusalem. The focus instead is on the importance of striking the delicate balance of power between the political branches—especially with respect to constitutional issues of first impression. *Zivotofsky* highlights the challenging decisions that the Court must make in absence of textual guidance. In no small way, the Court in *Zivotofsky* had to choose between the United States' unwavering policy as to the status of Jerusalem and the integrity of its separation of powers jurisprudence. The Court chose the former, at the cost of the latter.