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No. 13–628

In the Supreme Court of the United States

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

v.

JOHN KERRY, SECRETARY OF STATE,
Respondent.

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

BRIEF FOR THE UNITED STATES SENATE AS AMICUS CURIAE SUPPORTING PETITIONER

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JULY 2014

TABLE OF CONTENTS

	Page
Interest of Amicus	1
Summary of Argument	2
Argument	9
I. Congress Has Long Legislated Over Passports Under Its Plenary Authority to Regulate Foreign Commerce and To Establish Rules for Naturalization	13
II. Section 214(d) Does Not Intrude on the Recognition Power	20
A. Section 214(d) Is Not an Act of Recognition of Foreign Governments or Their Sovereign Territory	20
B. Section 214(d) Does Not Affect Any of the Consequences of Recognition of Foreign States	28
C. Section 214(d) Does Not Intrude on the Recognition Power Merely Because the Executive Fears Adverse Foreign Policy Consequences	30
Conclusion	33

TABLE OF AUTHORITIES

Page

Cases:

Banco Nacional v. Sabbatino, 376 U.S. 398 (1964) 6, 11
Demore v. Kim, 538 U.S. 510 (2003) 13
Guaranty Trust Co. v. United States, 304 U.S. 126 (1938) 7, 11
Haig v. Agee, 453 U.S. 280 (1981).... 3, 4, 18, 19, 21, 22
INS v. Chadha, 462 U.S. 919 (1983) 4, 19
Kent v. Dulles,, 357 U.S. 116 (1958) 3, 14, 16, 17
Medellin v. Texas, 552 U.S. 491 (2008)...................... 10
Morrison v. Olson, 487 U.S. 654 (1988) 20
Nat'l City Bank v. Republic of China, 348 U.S. 356 (1955) 7, 29
NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) 16
Nixon v. Adm'r of General Services, 433 U.S. 425 (1977) 7, 20
Oetjen v. Central Leather Co., 246 U.S. 297 (1918) 30
Stark v. Wickard, 321 U.S. 288 (1944) 19
United States v. Belmont, 301 U.S. 324 (1937)......... 11
United States v. Pink, 315 U.S. 203 (1942).......... 11, 29
Urtetiqui v. D'Arcy, 34 U.S. (9 Pet.) 692 (1835)........ 21
Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839) 11
Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952)................................ 3, 10, 11, 20, 32
Zemel v. Rusk, 381 U.S. 1 (1965)..................... 3, 17, 18
Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012) 8, 9, 11, 12, 32

Page

Zivotofsky v. Secretary of State, 725 F.3d 197 (D.C. Cir. 2013) .... *passim*
Zschernig v. Miller, 389 U.S. 429, 432 (1968).......... 30

Constitution and Statutes:

U.S. Const. art. I, § 8
Cl. 1 31
Cl. 3 .... 3, 9, 13, 31
Cl. 4 .... 3, 9, 13
Cl. 10-14 31
U.S. Const. art. II, § 2, Cl. 2 .... 12, 31
U.S. Const. art. II, § 3 12
Act of Feb. 28, 1803, ch. 9, § 8, 2 Stat. 203 13
Act of Feb. 4, 1815, ch. 31, § 10, 3 Stat. 195 13
Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. 52 .... 13, 14
Act of June 15, 1917, Pub. L. No. 65-24, Title IX, §§ 1-4, 40 Stat. 227 14
Act of June 4, 1920, Pub. L. No. 66-238, §§ 1-3, 41 Stat. 750-51 14
Act of July 3, 1926, Pub. L. No. 69-493, 44 Stat. 887 ("Passport Act of 1926")
§ 1 .... 14, 15, 17
§ 2 15
Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 124, 92 Stat. 971 (1978) 15
Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002)
§ 214(a), 116 Stat. 1365 27
§ 214(b), 116 Stat. 1366 27
§ 214(c), 116 Stat. 1366 27
§ 214(d), 116 Stat. 1366 .... *passim*
Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, 109 Stat. 398 (1995) 27

Page
2 U.S.C. § 288e(a) 2
2 U.S.C. § 288*l*(a).. 2
Pub. L. No. 71-488, 46 Stat. 839 (1930)..................... 15
Pub. L. No. 72-136, 47 Stat. 157 (1932)..................... 15
Pub. L. No. 86-267, 73 Stat. 552 (1959)..................... 15
Pub. L. No. 90-428, 82 Stat. 446 (1968)..................... 15
Pub. L. No. 103-236, § 127, 108 Stat. 394 (1994) 15
Pub. L. No. 103-415, § 1(b), 108 Stat. 4299 (1994) 15

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David Gray Adler, *The President's Recognition Power* in *The Constitution and the Conduct of American Foreign Policy* (David Gray Adler & Larry N. George eds., 1996) 12
The Federalist No. 69 (Alexander Hamilton) 12
7 Foreign Affairs Manual (FAM) 1300, App. D, *available at* http://www.state.gov/m/a/dir/regs/fam
7 FAM 1310(f), App. D 5, 24
7 FAM 1310(g)(2), App. D 4, 23
7 FAM 1310(g)(5), App. D 5, 24
7 FAM 1330, App. D.. 24
7 FAM 1360(c), App. D....................................... 5, 25
7 FAM 1360(d), App. D 5, 25
7 FAM 1360(f), App. D 6, 25
7 FAM 1360(h), App. D 6, 25
7 FAM 1380(a), App. D 5, 24
7 Foreign Affairs Manual (FAM)(1987)
7 FAM 1383.1 (1987)... 24
7 FAM 1383.5-5 (1987)....................................... 5, 25
7 FAM 1383.4(b) (1987).. 24
7 FAM 1383.5-6 (1987)....................................... 6, 25
7 FAM 1383.6 (1987).. 5, 24

Page

Presidential Statement on Signing Foreign Relations Authorization Act, FY 2003, 2002 Pub. Papers 1697 (Sept. 20, 2002) ... 26

Recent Case, *Zivotofsky v. Sec'y of State, 725 F.3d 197 (D.C. Cir. 2013)*, 127 Harv. L. Rev. 2154 (2014) ... 11

Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 Temp. L. Rev. 1 (2013) ... 12

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Remarks by Ambassador Susan E. Rice, U.S. Perm. Rep. to the United Nations, at the U.N. Security Council, Jan. 23, 2013, http://usun.state.gov/briefing/statements/203162.htm ... 25

Restatement (Third) of the Foreign Relations Law of the United States § 203 comment a ... 6, 28

Craig Robertson, *The Passport in America: the History of a Document* (2010) ... 22

S. Res. 504, 113th Cong. (2014), 160 Cong. Rec. S4559 (daily ed. July 16, 2014) ... 2

Suspension of Limitations Under the Jerusalem Embassy Act, 79 Fed. Reg. 33,839 (June 2, 2014) ... 27

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INTEREST OF AMICUS

This case presents the question whether a law enacted by Congress regulating the "place of birth" designation on U.S. passports and consular birth reports is unconstitutional because it transgresses the recognition power of the President. Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, 1366 (2002), allows U.S. citizens born in Jerusalem to elect to list the birthplace on their passports and Consular Reports of Birth Abroad as "Israel" in place of "Jerusalem," as currently required by Department of State policy. The Executive has refused

to implement this law and challenges its constitutionality in this case.

The Executive's position places in issue the powers and responsibilities of the Congress under the Constitution. The Senate has a strong interest in defending its plenary authority to legislate in the areas of foreign commerce and naturalization against the Executive's claim of intrusion into the power over recognition of foreign governments. The Senate appears as amicus curiae to present its views that section 214(d) is a constitutional exercise of Congress' power to regulate passports that does not implicate, let alone intrude upon, the Executive's exercise of the recognition power.[1]

SUMMARY OF ARGUMENT

1. In 2002, Congress exercised its legislative powers over foreign commerce and naturalization to enact a statute providing U.S. citizens born in Jerusalem with the option of listing Israel, instead of Jerusalem, as the "place of birth" on their passports and consular birth reports. Pub. L. No. 107-228,

[1] This appearance is undertaken pursuant to S. Res. 504, 113th Cong. (2014), 160 Cong. Rec. S4559 (daily ed. July 16, 2014), directing the Senate Legal Counsel to appear in the name of the Senate as amicus curiae under 2 U.S.C. § 288e(a), which authorizes the Senate to appear "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." Permission to appear as amicus is "of right" and may be denied only for untimeliness. 2 U.S.C. § 288*l*(a). This brief is submitted in accordance with Supreme Court Rule 37.4, which provides that "[n]o motion for leave to file an *amicus curiae* brief is necessary if the brief is presented . . . on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative."

§ 214(d), 116 Stat. 1350, 1366. The Executive has refused to comply with this law, claiming that it infringes on the President's constitutional power to recognize foreign governments by deviating from the State Department's present policy to list only the city (Jerusalem), and not any country, as the birthplace on passports of U.S. citizens born in Jerusalem.

"When the President takes measures incompatible with the expressed or implied will of Congress," as here, "his power is at its lowest ebb," and his actions "must be scrutinized with caution" and sustained only if Congress has intruded into a constitutional power of the Executive's wholly "disabling the Congress from acting upon the subject." *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring). The Executive's action cannot survive such scrutiny as Congress enacted section 214(d) pursuant to its legislative passport power and that statutory provision does not infringe on the Executive's power of recognition.

2. Section 214(d) is a valid exercise of Congress' legislative passport power. From the earliest days under the Constitution, Congress has enacted legislation governing passport issuance under its powers "To regulate Commerce with foreign Nations" and "To establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cls. 3, 4. This Court has recognized Congress' plenary authority over passports. *Kent v. Dulles*, 357 U.S. 116 (1958); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Haig v. Agee*, 453 U.S. 280 (1981). As these cases recognize, the Executive's exercise of authority over passports is based on congressional authorization. Therefore, Congress may

legislatively control the issuance and content of passports. *See INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) ("[L]egislatively delegated authority . . . is always subject to check by the terms of the legislation that authorized it.").

3. Section 214(d) does not intrude on the recognition power as it does not effectuate recognition of any sovereign or its territory, nor affect any of the consequences of recognition regarding sovereignty over Jerusalem.

Allowing citizens born in Jerusalem to list "Israel" as their place of birth does not "recognize" Israel's sovereignty over Jerusalem because the birthplace designation is not an act of foreign recognition, but a mechanism for identifying the passport holder. As this Court has explained, the modern passport serves largely as a "travel control document," and, in that role, "is both a proof of identity and proof of allegiance to the United States." *Haig*, 453 U.S. at 293. Including the passport holder's birthplace serves this identification function, as the State Department has acknowledged: "[The place of birth] entry is included to assist in identifying the individual, not the individual's nationality. The passport very clearly states that the bearer is a United States national or citizen." 7 Foreign Affairs Manual (FAM) 1310(g)(2), App. D.[2]

[2] Since the filing of this lawsuit, the State Department has revised the Foreign Affairs Manual (FAM) provisions regarding the place-of-birth designation of U.S. citizens born in Israel, Jerusalem, and the West Bank and Gaza Strip, but has indicated that "[t]hose revisions made no change in policy." Brief of Respondent in Opposition at 4 n.2. This amicus brief cites to the current version of the FAM, available at http://www.state.gov/m/a/dir/regs/fam. Where applicable, citation is also provided to the related provision in the 1987 version of

The State Department's flexible policies regarding how citizens born abroad generally may choose to list their birthplace in passports and birth reports reflect that the "place of birth" listing on passports serves as a method of identifying the passport holder, and not as a statement of recognition by the U.S. Government. The Department allows individuals born abroad who "object[] to listing a country that currently has sovereignty over the actual place of birth" to choose to list their city of birth in the passport in lieu of the country. 7 FAM 1310(f), (g)(5), 1380(a), App. D (7 FAM 1383.6 (1987), JA 114). Allowing alternative listings for the same birthplace—to accommodate the objection of the passport holder—belies the Executive's view that the "place of birth" listing in the passport is necessarily an act of recognition, for, if it were so, only the recognized sovereign nation would be listed in every instance, and not cities as presently allowed.

The Department's policies regarding the "place of birth" listing for citizens born in Israel and surrounding areas (but not in Jerusalem) similarly refute the Executive's claim that the "place of birth" designation implicates the recognition of sovereignty over Jerusalem. While the United States does not recognize a foreign state of "Palestine," U.S. citizens born in the West Bank and Gaza Strip before May 14, 1948 may elect to list their place of birth either as "Palestine," or as "West Bank" or "Gaza Strip." 7 FAM 1360(c), (d), App. D (7 FAM 1383.5-5 (1987), JA 112-13). Likewise, U.S. citizens

the FAM in effect at the time this suit was filed. Relevant provisions of the 1987 version are included in the Joint Appendix at 109-159.

born before May 14, 1948, in a location outside Jerusalem's then-municipal limits, but since annexed into the city, may also elect to list "Palestine" as their place of birth, despite the fact that they were born in present-day Jerusalem. 7 FAM 1360(f), (h), App. D (7 FAM 1383.5-6 (1987), JA 113). Permitting varied, and potentially confusing, birthplace listings in passports undermines the Executive's claim that adhering to section 214(d) would constitute recognition of Israel's sovereignty over Jerusalem.

4. Nor does section 214(d) affect any of the legal consequences of recognition. Recognition of a foreign state is:

> formal acknowledgment that the entity possesses the qualifications for statehood, and implies a commitment to treat that entity as a state. . . . Recognition of a [foreign] government is formal acknowledgement that a particular regime is the effective government of a state and implies a commitment to treat that regime as the government of that state.

Restatement (Third) of the Foreign Relations Law of the United States § 203 comment a. Recognition confers certain benefits on that sovereign, such as permitting it to "maintain a suit in a United States court, assert the sovereign immunity defense . . . and benefit from the 'act of state' doctrine" that precludes the courts of one country from sitting in judgment on the acts of the government of another country within its own territory. *Zivotofsky v. Secretary of State*, 725 F.3d 197, 205 (D.C. Cir. 2013) (internal citations omitted); *see Banco Nacional v. Sabbatino*, 376 U.S. 398, 408-09

(1964); *Nat'l City Bank v. Republic of China*, 348 U.S. 356, 359 (1955); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938).

Allowing U.S. citizens born in Jerusalem to elect to list their place of birth as "Israel" on passports and birth reports does not affect any consequences of formal recognition of the status of Jerusalem. It does not change how U.S. courts treat Israel or Jerusalem in legal matters. It does not determine the status of any sovereign property. It does not alter the treatment of the judgments of the local courts in Jerusalem by U.S. courts. It does not affect the immunity of any sovereign in U.S. courts. It does not require the President to receive ambassadors from, or send ambassadors to, any country, nor to confer any benefits that flow from recognition regarding Jerusalem or its relationship to Israel. In short, section 214(d) does not affect the position of the United States, as expounded by the President, regarding recognition of sovereignty over Jerusalem, nor carry any of the legal consequences of recognition. Accordingly, section 214(d) does not infringe on the recognition power or otherwise "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Adm'r of General Services*, 433 U.S. 425, 443 (1977).

5. The court of appeals erred in concluding that Congress' exercise of its legislative passport power impermissibly intrudes on the recognition power because of the President's concern that section 214(d) could cause "adverse foreign policy consequences." *Zivotofsky*, 725 F.3d at 219-20. That conclusion mistakenly conflates the recognition power with the Executive's role in carrying out the Nation's foreign policy generally.

The Executive and Congress share constitutional responsibility over foreign affairs. Congress exercises legislative authority in numerous areas significantly affecting foreign affairs, including appropriating funds, regulating foreign commerce, imposing customs duties and tariffs, declaring war, and raising and supporting the Nation's military forces. In addition, the Senate ratifies treaties and provides advice and consent to the appointment of ambassadors and other public ministers and consuls. Obviously, legislation and Senate action in these areas may have profound "foreign policy consequences." *Id.* at 219. It is equally clear that the specter of adverse consequences does not render such legislative action unconstitutional. By striking down section 214(d) because the Executive believes the provision has harmful foreign policy consequences, the court of appeals improperly constricted Congress' legitimate exercise of legislative authority.

The court of appeals also abdicated judicial oversight of Executive action. Having linked exercise of the recognition power to effects on foreign policy, the court accepted as "conclusive" the Executive's "view" that section 214(d) would "cause adverse foreign policy consequences," because the Judiciary is "not equipped to second-guess the Executive regarding the foreign policy consequences of section 214(d)." *Id.* at 219-20. Hence, under the court's reasoning, section 214(d)'s constitutionality is entirely dependent on the Executive's view of the statute's effect on foreign policy, effectively—and improperly—ceding to that Branch the courts' responsibility to decide the constitutionality of congressional enactments. *Zivotofsky v. Clinton*, 132 S. Ct. 1421,

1428 (2012). Indeed, hinging the constitutionality of section 214(d) on the Executive's effectively unreviewable assessment of the statute's foreign policy consequences essentially transforms the issue into a non-justiciable political question committed to the Executive—a conclusion this Court expressly rejected when this case was last before it. *Id.* ("[T]here is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute."). Consistent with that prior decision, the Court should reject the Executive's claim that it may decline to follow section 214(d) because of its assertion that the provision may cause adverse foreign policy consequences.

ARGUMENT

In this case, the Executive claims inherent constitutional authority to disregard a law enacted in the exercise of Congress' legislative authority over the contents of U.S. passports and Consular Reports of Birth Abroad. In 2002, Congress enacted legislation directing how "place of birth" may be listed on passports and birth reports for U.S. citizens born in Jerusalem, pursuant to Congress' authority to regulate foreign commerce and to establish a "uniform Rule of Naturalization." U.S. Const. art. I. § 8, cls. 3, 4; Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002). The Executive has refused to comply with this law because, it claims, a law permitting U.S. citizens to exercise a personal prerogative over the listing of their place of birth on their passports infringes on the exclusive power of the President to recognize foreign governments.

As the Executive's action directly contravenes the clearly expressed will of Congress in section 214(d), "Justice Jackson's familiar tripartite scheme" in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), "provides the accepted framework for evaluating executive action in this area." *Medellin v. Texas*, 552 U.S. 491, 524 (2008). Justice Jackson explained:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.

Youngstown, 343 U.S. at 637-38 (Jackson, J., concurring).

Congress, pursuant to its constitutional power to regulate passports, has expressly legislated here—allowing citizens born in Jerusalem the option to list "Israel" as the place of birth on their passports and consular birth reports—and the Executive has declined to comply with that law. Under such circumstances, the President's power is "in the least favorable of possible constitutional postures," and the Court "can sustain the President only by holding that [the place-of-birth specification on U.S. passports] is within his domain and beyond control of Congress." *Id.* at 640. The Executive's action contrary to the requirements of section 214(d) can be sustained only if Congress has intruded into a constitutional power of the Executive's wholly "disabling the Congress from acting upon the subject."

Id. at 637-38. Because such a claim of exclusive Executive power is "at once so conclusive and preclusive" over the other branches, it "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.*

The Executive's action here cannot survive such scrutiny. Congress enacted section 214(d) pursuant to its well-established power over passports. Congress has neither usurped, nor prevented the President from exercising, authority to recognize the territory of foreign sovereigns. Therefore, section 214(d) is a constitutional exercise of Congress' legislative passport power that does not intrude on the recognition power, and the Executive is obliged to comply with its terms.[3]

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[3] In striking down section 214(d), the court of appeals held that the recognition power is exclusively the President's. *Zivotofsky*, 725 F.3d at 205-14. As Judge Tatel recognized, *id.* at 222 (Tatel, J., concurring), this Court has never had occasion to decide whether that power is the President's alone or shared with Congress. No prior case addressing recognition entailed a dispute between the President and Congress, where the President's power is at "its lowest ebb." *Youngstown*, 343 U.S. at 637; *see Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415 (1839); *United States v. Belmont*, 301 U.S. 324 (1937); *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938); *United States v. Pink*, 315 U.S. 203 (1942); *Banco Nacional v. Sabbatino*, 376 U.S. 398 (1964); Recent Case, *Zivotofsky v. Sec'y of State, 725 F.3d 197 (D.C. Cir. 2013)*, 127 Harv. L. Rev. 2154, 2161 (2014).

While the Court need not, and should not, address the issue here, the Senate agrees with Petitioner that Congress shares the recognition power. Brief of Petitioner at 27-57. "Careful examination of the textual, structural, and historical evidence," *Zivotofsky*, 132 S. Ct. at 1430, supports this conclusion. The Constitution's text grants the Executive no exclusive

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power over recognition. As Hamilton noted at the Framing, the clause directing the President to "receive Ambassadors and other public Ministers," U.S. Const. art. II, § 3, which the Executive relies on as the supposed source of exclusive power, is "more a matter of dignity than of authority" and "will be without consequence in the administration of the government." The Federalist No. 69.

Nor does the Constitution's structure support a claim of exclusive Presidential power over recognition. The Constitution divides between the President and the Senate key roles in foreign policy decision-making. *See, e.g.*, U.S. Const. art. II, § 2, cl. 2 (treaty power and appointment of ambassadors). Granting exclusive power over recognition to the President "would have been contrary to both the constitutional design for collective decisionmaking in the formulation of foreign policy and the Framers' determination to place the primary responsibility for the conduct of foreign relations"—the treatymaking power—in the hands of "the president and the Senate." David Gray Adler, *The President's Recognition Power* in *The Constitution and the Conduct of American Foreign Policy*, 135, 148-49 (David Gray Adler & Larry N. George eds., 1996). "The constitutional structure of checks and balances does not support an exclusive (and uncheckable) recognition power in the Executive." Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 Temp. L. Rev. 1, 58 (2013).

Finally, historical practice does not support an exclusive presidential recognition power. As a leading scholar recently found after an exhaustive survey of post-ratification historical practice, history "provides little support for any claim of an exclusive recognition power. The weight of the evidence contradicts such a claim of exclusive executive power. . . ." *Id*. at 8; *see id.* at 9-50 (historical record reflects that Congress and President have shared in recognition actions).

Nevertheless, the Court need not reach—and should not address—that broad question in this case. Section 214(d) neither infringes on, nor is an exercise of, the recognition power. Therefore, "[t]his case does not require the Judiciary to decide whether the power to recognize foreign governments and the extent of their territory is conferred exclusively on the President or is shared with Congress." *Zivotofsky*, 132 S. Ct. at 1436 (Alito, J., concurring). Where Congress has not exercised

I. CONGRESS HAS LONG LEGISLATED OVER PASSPORTS UNDER ITS PLENARY AUTHORITY TO REGULATE FOREIGN COMMERCE AND TO ESTABLISH RULES FOR NATURALIZATION

A. The Constitution grants Congress the power "To regulate Commerce with foreign Nations" and "To establish an uniform Rule of Naturalization," U.S. Const. art. I, § 8, cls. 3, 4; *see Demore v. Kim*, 538 U.S. 510, 521 (2003) (Congress has "broad power over naturalization and immigration") (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)). Pursuant to these powers, Congress has enacted legislation governing the issuance of passports from the earliest days under the Constitution. In 1803, Congress made it a crime for a consul or commercial agent of the United States knowingly to grant a passport to an alien. *See* Act of Feb. 28, 1803, ch. 9, § 8, 2 Stat. 203, 205. During the War of 1812, Congress prohibited U.S. citizens from crossing into any territory "belonging to the enemy" without "a passport first obtained from the Secretary of State" or other specified federal or state official. Act of Feb. 4, 1815, ch. 31, § 10, 3 Stat. 195, 199.

Congress broadly regulated passport issuance in 1856. Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. 52, 60. Congress authorized the Secretary of State "to grant and issue passports" and to authorize the issuance of passports by U.S. diplomatic or consular officers in foreign countries, "under such rules as

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the recognition power nor attempted to overturn the Executive's exercise of that power, the Court should not reach out to decide the unresolved question whether the recognition power is the President's alone or shared with Congress.

the President shall designate and prescribe for and on behalf of the United States." *Id.* The Act forbade anyone other than the designated federal officials from issuing passports and continued the prohibition against knowingly granting passports to aliens. *Id.*[4]

In 1917, Congress mandated that persons seeking passports submit a written application under oath and made it a crime knowingly to make a false statement in a passport application, to use a passport issued to another person, to violate the restrictions in a passport, or to forge, counterfeit, or alter passports. Act of June 15, 1917, Pub. L. No. 65-24, Title IX, §§ 1-4, 40 Stat. 227. Three years later, Congress increased passport fees and modified the period for which passports were valid. Act of June 4, 1920, Pub. L. No. 66-238 §§ 1-3, 41 Stat. 750-51.

Congress overhauled the passport laws in 1926. Act of July 3, 1926, Pub. L. No. 69-493, 44 Stat. 887 ["Passport Act of 1926"]. Using essentially identical language as in the 1856 law, the Passport Act of 1926 authorized the Secretary of State to "grant and issue passports" and to cause such passports to be issued in foreign countries by diplomatic and consular representatives, "under such rules as the

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[4] Prior to this law, "various federal officials, state and local officials, and notaries public had undertaken to issue either certificates of citizenship or other documents in the nature of letters of introduction to foreign officials requesting treatment according to the usages of international law." *Kent v. Dulles*, 357 U.S. 116, 123 (1958). The 1856 Act "put an end to those practices." *Id.* It also prohibited imposing "any charge . . . for granting, issuing, or verifying any passport except in a foreign country," where it permitted a fee of no more than $1. Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. at 60.

President shall designate and prescribe for and on behalf of the United States." *Id.* § 1. The Act continued the prohibition against anyone other than the designated federal officials granting, issuing, or verifying passports and limited the validity of passports to two years, subject to one renewal. *Id.* §§ 1-2.

Although Congress has modified the provisions of the Passport Act of 1926 over time, that statute remains the basis for the Executive's authority to issue passports. Indeed, section 1 of the Act—authorizing the Secretary to grant passports—has been amended only twice. In 1978, Congress prohibited the Executive from issuing passports that are "restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers." Foreign Relations Authorization Act, FY 1979, Pub. L. No. 95-426, § 124, 92 Stat. 963, 971 (1978). And twenty years ago, Congress modified the universe of officials who could issue passports.[5]

Accordingly, from early in the Nation's history, Congress has exercised its power to regulate the manner in which the Executive issues passports, including restricting which officials can grant pass-

[5] Pub. L. No. 103-236, § 127, 108 Stat. 382, 394 (1994), *as amended by* Pub. L. No. 103-415, § 1(b), 108 Stat. 4299 (1994). Over time, Congress has modified other provisions of the 1926 Passport Act, including by raising fees and lengthening the period of validity. *See, e.g.,* Pub. L. No. 71-488, 46 Stat. 839 (1930); Pub. L. No. 72-136, 47 Stat. 157 (1932); Pub. L. No. 86-267, 73 Stat. 552 (1959); Pub. L. No. 90-428, 82 Stat. 446 (1968).

ports, requiring that passport applications be written and submitted under oath, establishing the period passports remain valid, setting the passport fee, and criminalizing the creation or use of fraudulent passports. This longstanding, unchallenged legislative direction of the Executive affirms Congress' plenary authority to regulate issuance of passports. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) ("'[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President.") (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

B. The Court has consistently recognized Congress' plenary authority over passports and looked to Congress' legislative direction and delegation of authority to the Executive to delimit the scope of the proper exercise of the Executive's duties. In so doing, the Court has not relied on any inherent constitutional authority of the Executive, but has treated the Executive's administration of passport responsibilities as derived from and bound by Congress' legislative enactments, invalidating Executive action when not traceable to authority granted by Congress.

In *Kent v. Dulles*, 357 U.S. 116 (1958), two U.S. citizens sued the Secretary of State after he denied them passports on the ground that they were members of the Communist Party. The citizens claimed that the State Department's regulation prohibiting the issuance of passports to Communist Party members was not authorized by the Passport Act of 1926. The Court held that the Secretary lacked authority under the Passport Act to deny passports on

that ground. *Id.* at 129-30. In reaching this conclusion, the Court considered whether the discretion Congress granted the Secretary of State to "issue passports . . . under such rules as the President shall designate and prescribe," Passport Act of 1926, § 1, 44 Stat. 887, authorized denying passports on the basis of Communist Party membership. The Court found that this ground was not one of the bases for denying passports "which it could fairly be argued were adopted by Congress" based on prior administrative practice at the time Congress enacted the Passport Act of 1926. *Kent*, 357 U.S. at 128. Accordingly, the Court held that the Passport Act of 1926 did not authorize the Secretary to deny passports to citizens based on Communist Party membership. Absent such authorization, the Court reasoned, the Secretary could not withhold passports on that ground. The Court did not mention even the possibility that inherent presidential power might provide a basis for denying passports in the absence of congressional authorization.

This Court has since twice sustained the Secretary's actions regarding passports. In both cases, the Court looked solely to whether the Secretary's actions were authorized by Congress in the Passport Act of 1926. In *Zemel v. Rusk*, 381 U.S. 1 (1965), following the breaking of U.S. diplomatic relations with Cuba, the Court upheld the State Department's imposition of a requirement that the Secretary specifically endorse passports to be valid for travel to Cuba. Zemel, a U.S. citizen, sued to challenge the denial of his request to validate his passport for travel to Cuba, arguing that the Secretary lacked authority to restrict passports for such travel. *Id.* at 3-4. Focusing on the statutory

question whether Congress had authorized the Secretary to restrict passports for travel to Cuba, the Court found that Congress had implicitly approved the Executive's authority to impose area restrictions in passports when it enacted the Passport Act of 1926:

> The use in the 1926 Act of language broad enough to permit executive imposition of area restrictions, after the Executive had several times in the recent past openly asserted the power to impose such restrictions under predecessor statutes containing substantially the same language, supports the conclusion that Congress intended in 1926 to maintain in the Executive the authority to make such restrictions.

Id. at 9.

The Court again relied on Congress' exercise of its legislative passport authority in *Haig v. Agee*, 453 U.S. 280, 283-84 (1981), to sustain the Secretary's revocation of the passport of Agee, a citizen engaged in a "campaign" to expose CIA personnel operating under cover in foreign countries. The Secretary had revoked Agee's passport, relying on regulations authorizing denial or revocation where a passport holder's "activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." *Id.* at 286, 299-300. Agee challenged the revocation asserting, *inter alia,* that Congress had not authorized revocation of passports on that basis. *Id.* at 287. In upholding the Secretary's action, the Court noted that the Executive had long construed the passport laws to authorize it to withhold passports for reasons of national security or foreign policy. *Id.*

at 299-301. As in *Zemel*, the Court found that Congress' amending of the passport laws, aware of the Executive's "longstanding and officially promulgated view," constituted "weighty evidence of congressional approval of the Secretary's interpretation" that the statute authorized denying or revoking passports on national security grounds. *Id.* at 301. The Court upheld the Executive's action not because of the President's independent constitutional power over foreign relations, which the Court did not rely on, *see id.* at 289 n.17, but because Congress had legislatively authorized revocation of passports on those grounds.

Thus, this Court has recognized that Congress possesses plenary legislative authority over passport issuance and that the Executive's exercise of authority in the passport area is derived from, and based on, authorization granted by Congress. Executive action under such "legislatively delegated authority . . . is always subject to check by the terms of the legislation that authorized it." *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983). As the Court's analysis in *Kent v. Dulles* and the subsequent passport cases illustrates, "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Stark v. Wickard*, 321 U.S. 288, 309 (1944). Thus, having authorized the Secretary of State to issue passports pursuant to its legislative powers over foreign commerce and naturalization, Congress may control how passports are issued and what information they contain. The Secretary, in acting pursuant to the authority Congress has granted him to issue passports, must comply with

Congress' direction in exercising that authority, unless Congress has intruded into a constitutional power of the President's wholly "disabling the Congress from acting upon the subject." *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring).

II. SECTION 214(d) DOES NOT INTRUDE ON THE RECOGNITION POWER

This Court has "squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches." *Nixon v. Adm'r of General Services*, 433 U.S. 425, 443 (1977). In determining whether an Act of Congress "disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id.*; *see also Morrison v. Olson*, 487 U.S. 654, 695 (1988). Section 214(d) usurps no constitutional power of the Executive over recognizing foreign governments. In enacting section 214(d), Congress has neither exercised the power of recognition, nor "prevent[ed] the Executive Branch from accomplishing its constitutionally assigned functions" of recognition, *Nixon*, 433 U.S. at 443, regarding the official position of the United States on sovereignty over Jerusalem.

A. Section 214(d) Is Not an Act of Recognition of Foreign Governments or Their Sovereign Territory.

The court of appeals held that section 214(d), "by attempting to alter the State Department's treatment of passport applicants born in Jerusalem, . . . directly contradicts a carefully considered exercise of the Executive branch's recognition

power." *Zivotofsky*, 725 F.3d at 217. The court erred in ruling that providing U.S. citizens with an option for identifying their place of birth in passports and consular birth reports constitutes an act of recognition of foreign governments by the United States. The nature of the modern passport, the purpose of "place of birth" information in the passport, and the State Department's policies providing U.S. citizens born abroad with options in identifying their birthplace in passports demonstrate that birthplace information serves solely to identify the passport bearer and not to recognize sovereign governments or their territory.

1. Traditionally, a passport had been considered "a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer." *Haig*, 453 U.S. at 292 (citing 3 G. Hackworth, Digest of International Law § 268, at 499 (1942)). As this Court explained in 1835:

> [The passport] is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognised, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact.

Urtetiqui v. D'Arcy, 34 U.S. (9 Pet.) 692, 698 (1835).

As more American citizens began to travel abroad and use of passports became more wide-

spread,[6] however, their function shifted, such that, "for present purposes," a passport serves mostly as a "travel control document," and, in that role, "a passport is both proof of identity and proof of allegiance to the United States." *Haig*, 453 U.S. at 293; *see* Craig Robertson, *The Passport in America: the History of a Document* 11 (2010) (role of passport has changed "from something like a letter of introduction to a certificate of citizenship to an identification document").

Listing the place of birth serves the identification function of the modern passport; it does not make a statement of recognition on the part of the U.S. Government. Including birthplace information in passports "developed over time as a matter of international custom and use" and was first required by the United States in the 1920s. U.S. General Accounting Office Report to Congress, GAO/NSIAD-87-201, "Passports: Implications of Deleting the Birthplace in U.S. Passports" 6 (August 1987) *available at* http://www.gao.gov/products/NSIAD-87-201. "Governments use this and other information—such as name, nationality, and birth date contained in passport documents—to verify an individual's identity." *Id.*

The State Department itself has recognized that birthplace information is included in the passport for identification purposes only. As the Depart-

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[6] For much of U.S. history, passports were not required to travel outside the United States, at least in times of peace. That changed in modern times, as passports became required for foreign travel to more nations even in peacetime. In 1978, Congress required passports at all times for travel to and from the United States, with few exceptions. *See Haig*, 453 U.S. at 293 n.22.

ment's current Foreign Affairs Manual states: "[The place of birth] entry is included to assist in identifying the individual, not the individual's nationality. The passport very clearly states that the bearer is a United States national or citizen." 7 FAM 1310(g)(2), App. D. In responding to interrogatories in this case, the Department confirmed that identification is the sole purpose served by the "place of birth" specification:

> The "place of birth" specification assists in identifying the individual, distinguishing that individual from other persons with similar names and/or dates of birth, and identifying fraudulent claimants attempting to use another person's identity. The information also facilitates retrieval of passport records to assist the Department in determining citizenship or notifying next of kin or other person designated by the individual to be notified in case of an emergency on the U.S. passport application. The date and place of birth fields are also used in the Department of State American Citizens Services (ACS Plus) electronic case tracking system.[7]

Thus, the Department itself recognizes that the "place of birth" entry in a passport serves to aid in identifying the passport bearer; it is not an instrument for recognizing foreign sovereignty.

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[7] JA 70 (Defendant's Responses to Plaintiff's Interrogatories #16). A State Department official confirmed in testimony that the "place of birth" specification serves identification purposes and identified no other reason for its inclusion. JA 78-79 (Tr. of Deposition of Catherine Barry, Dep. Ass't Sec'y for Overseas Services, U.S. Dep't of State).

2. The Department's flexible policies regarding how citizens born abroad may choose to list their birthplace in passports and birth reports further reflect that the birthplace serves as a manner of personal identification of the holder of the passport and not as a statement of recognition by the U.S. Government. The Department allows individuals born abroad who "object[] to listing a country that currently has sovereignty over the actual place of birth" to choose to list their city of birth in the passport in lieu of the country. 7 FAM 1310(f), (g)(5), 1380(a), App. D (7 FAM 1383.6 (1987), JA 114).[8] This policy permits citizens to express their "object[ion]" to the nation recognized by the U.S. Government as having sovereignty over their birthplace by choosing to omit the name of that nation from their passport. Allowing citizens born all over the world such individual choice in listing their birthplace—based on their personal objection to listing the sovereign recognized by the United States—is incompatible with the Executive's claim that the "place of birth" listing implicates the Government's recognition of foreign sovereigns.

The Department's policies regarding the "place of birth" listing for citizens born in Israel and surrounding areas (but not in Jerusalem) similarly undermine its claim that the "place of birth" designation implicates the U.S. Government's recognition of sovereignty over Jerusalem. While the United States does not recognize a foreign state of "Palestine," and the Executive's position is that such

[8] Absent exercise of this personal option, the "place of birth" listed on a passport is "the country that currently has sovereignty over the actual place of birth." 7 FAM 1330, App. D (7 FAM 1383.1, 1383.4(b) (1987), JA 109-10).

recognition (like the status of Jerusalem) depends on the outcome of final status negotiations between the Palestinians and Israel, *see* Remarks by Ambassador Susan E. Rice, U.S. Perm. Rep. to the United Nations, at the U.N. Security Council (Jan. 23, 2013), http://usun.state.gov/briefing/statements/203162.htm, U.S. citizens born in the West Bank and Gaza Strip before May 14, 1948 may elect to list their place of birth either as "Palestine" or as "West Bank" or "Gaza Strip." 7 FAM 1360(c), (d), App. D (7 FAM 1383.5-5 (1987), JA 112-13). Likewise, U.S. citizens born before May 14, 1948, in a location outside Jerusalem's then-municipal limits, but since annexed into the city, can also elect to list "Palestine" as their place of birth, despite the fact that they were born in present-day Jerusalem. 7 FAM 1360(f), (h), App. D (7 FAM 1383.5-6 (1987), JA 113).

Allowing such alternative listings on U.S. passports as a matter of personal affinity and self-identification refutes the Executive's claim that the birthplace listing is tantamount to a statement of recognition. Listing "Jerusalem" on the passports of some U.S. citizens born in Jerusalem and "Israel" on others' does not constitute U.S. recognition of Israel's claim to sovereignty over Jerusalem. That the Department's policies provide for varied—and potentially confusing—listings of birthplace in passports undermines the Executive's claim that adhering to section 214(d) would constitute recognition of Israeli sovereignty over Jerusalem.[9]

[9] Nor does the possibility of misperception by some foreign observers about the import of permitting alternative birthplace specifications on passports support the Executive's claim

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In sum, the Executive's own statements and policies on the "place of birth" designation confirm that the purpose of listing the birthplace in passports and consular birth reports is to aid in identifying the passport bearer and that such listings do not constitute a statement of official recognition.

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that such listings constitute acts of recognition. Just as someone viewing a U.S. passport that lists "Palestine" as place of birth would not necessarily know (and, indeed, would be very unlikely to know) whether the passport bearer was born in a location within the present municipal boundaries of Jerusalem, and thus would not likely confuse such a listing as a statement of U.S. policy on Jerusalem, so, too, is a passport listing "Israel" as place of birth unlikely to be identified with Jerusalem, rather than other cities in Israel, such as Tel Aviv or Haifa. (Section 214(d) does not under any circumstance provide for a passport to list "Jerusalem, Israel." This case, therefore, does not present any potential for confusion over that.)

Indeed, unlike a passport that, in accord with section 214(d), lists "Israel"—a sovereign nation recognized by the United States—a passport listing "Palestine" would more likely cause confusion over recognition; a viewer of such a passport might reasonably, but erroneously, infer that the United States recognizes a sovereign state of Palestine, especially given the State Department's general policy of listing as the place of birth the nation currently sovereign over the actual birthplace. To the extent that review of the Foreign Affairs Manual would reveal that the designation of Palestine is used only for persons born before 1948 and, thus, that listing "Palestine" as a place of birth does not speak to the current status of that political entity or of Jerusalem, so, too, do official statements of the President make clear that the designation of "Israel" as birthplace on a U.S. passport under section 214(d) does not constitute recognition of Israeli sovereignty over Jerusalem. *See* Statement by the President on Signing Foreign Relations Authorization Act, FY 2003, 2002 Pub. Papers 1697, 1698 (Sept. 30, 2002). It is unclear how these cases materially differ except for the Executive's assertion that the latter instance implicates recognition and the former does not.

Accordingly, permitting U.S. citizens born in Jerusalem to choose to list "Israel" as the place of birth on their passports under section 214(d) does not effectuate the recognition of any nation's claim to sovereignty over Jerusalem, nor infringe upon the Executive's decision not to recognize any nation's sovereignty over Jerusalem.[10]

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[10] That section 214 is headed "United States Policy with Respect to Jerusalem as the Capital of Israel" does not render subsection (d) a recognition of Israel's sovereignty over Jerusalem. Section 214's heading more accurately reflects the three preceding subsections of section 214, *see* Pub. L. No. 107-228, § 214(a)-(c), 116 Stat. 1365-66 (addressing diplomatic and political status of Jerusalem), none of which is at issue in this case. The only provision at issue here, subsection (d), is limited to providing an option for citizens born in Jerusalem to have their birthplace listed as "Israel" on their passports and birth reports. Section 214's heading does not change the scope of section 214(d) or transform this constitutional exercise of Congress' passport power into an impermissible intrusion on the recognition power. Whether subsection (d) infringes on the recognition power cannot depend on whether it is part of section 214 or is in another section with a different heading or no heading.

Indeed, the governing federal statute concerning the diplomatic status of Jerusalem is not section 214(d), but the Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, 109 Stat. 398 (1995), which was enacted seven years before section 214(d) and remains in effect. That statute conditions the expenditure of funds appropriated to the State Department for buildings abroad on the relocating of the U.S. Embassy in Israel to Jerusalem. *Id.* § 3, 109 Stat. 399. In deference to the Executive, however, Congress authorized the President to suspend the limitation for 6-month periods if he determines that "such suspension is necessary to protect the national security interests of the United States." *Id.* § 7(a), 109 Stat. 400. The President has exercised this statutory prerogative and suspended the appropriations limitation ever since enactment. *See, e.g.,* Sus-

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B. Section 214(d) Does Not Affect Any of the Consequences of Recognition of Foreign States.

That section 214(d) does not constitute an exercise of the power of recognition is evidenced by the fact that section 214(d) does not bring about any of the legal consequences of recognition. Recognition of a foreign state is:

> formal acknowledgment that the entity possesses the qualifications for statehood, and implies a commitment to treat that entity as a state. . . . Recognition of a [foreign] government is formal acknowledgment that a particular regime is the effective government of a state and implies a commitment to treat that regime as the government of that state.

Restatement (Third) of the Foreign Relations Law of the United States § 203 comment a. As the court of appeals explained, recognition of a foreign sovereign by the U.S. Government confers benefits on that sovereign, permitting it to:

> (1) maintain a suit in a United States court, *see* [*Banco Nacional v. Sabbatino*, 376 U.S. 398, 408-09 (1964)]; *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938); (2) assert the sovereign immunity defense in a United States court, *see Nat'l City Bank v. Republic of China*, 348 U.S. 356, 359 (1955); and (3) benefit from the "act of state" doctrine, which provides that "[e]very sovereign state is bound to re-

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pension of Limitations Under the Jerusalem Embassy Act, 79 Fed. Reg. 33,839 (June 2, 2014).

> spect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303 (1918).

Zivotofsky, 725 F.3d at 205 (parallel citations omitted); *see also* Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power,* 45 U. Rich. L. Rev. 801, 803 (2011) ("A nonrecognized state or government cannot sue in the courts of the United States, except perhaps if given clearance by the State Department. Nor can it ordinarily invoke the doctrine of foreign sovereign immunity.")(internal footnotes omitted).

Allowing U.S. citizens born in Jerusalem to elect to list their place of birth as "Israel" on passports and birth reports does not affect any consequences of formal recognition of the status of Jerusalem. It does not change how U.S. courts treat Israel or Jerusalem in legal matters. *Cf. United States v. Pink*, 315 U.S. 203, 223 (1942) ("recognition of a foreign sovereign conclusively binds the courts"). It does not determine the status of any sovereign property. It does not alter the treatment of the judgments of the local Jerusalem courts by U.S. courts. It does not affect the immunity of any sovereign in U.S. courts. *Cf. Nat'l City Bank v. Republic of China*, 348 U.S. 356, 358 (1955). It does not require the President to receive ambassadors from, or send ambassadors to, any country, nor to confer any benefits that flow from recognition regarding Jerusalem or its relationship to Israel. In short, section 214(d) does not affect the position of the United States, as expounded by the President, regarding the recogni-

tion of sovereignty over Jerusalem, nor carry any of the legal consequences of recognition. Thus, section 214(d) neither usurps nor infringes on the recognition power.

C. Section 214(d) Does Not Intrude on the Recognition Power Merely Because the Executive Fears Adverse Foreign Policy Consequences.

The court of appeals erred in concluding that Congress' exercise of its legislative passport power in section 214(d) impermissibly intrudes on the recognition power because of the President's concern that perception abroad, accurate or not, of the significance of birthplace designations on U.S. passports could spawn "adverse foreign policy consequences." *Zivotofsky*, 725 F.3d at 219-20. That conclusion mistakenly conflates the recognition power with the Executive's role in carrying out the Nation's foreign policy generally. By so conflating these matters, the court expanded the scope of the President's recognition power, improperly limiting Congress' authority over passports and upsetting the delicate balance between the Executive and Legislative Branches in the realm of foreign affairs.

Under the Constitution, the two political branches share responsibility over foreign affairs. *See Zschernig v. Miller*, 389 U.S. 429, 432 (1968) ("the Constitution entrusts to the President and the Congress" the "field of foreign affairs"); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government . . . ."). Congress exercises legislative authority in numerous areas significantly affecting

foreign policy. Congress appropriates all funds for the conduct of foreign, as well as domestic, policy; regulates foreign commerce; and lays customs duties and tariffs. U.S. Const. art. I, § 8, cls. 1, 3. Congress declares war; raises and supports armies; provides and maintains the navy; and defines and punishes offenses on the high seas and against the law of nations. *Id.* art. I, § 8, cls. 10-14. The Senate ratifies treaties and provides advice and consent to the appointment of ambassadors and other public ministers and consuls. *Id.* art. II, § 2, cl. 2.

Obviously, legislation in these areas may have profound "foreign policy consequences." *Zivotfosky*, 725 F.3d at 219. There is no doubt that Congress' declaration of war or the Senate's refusal to ratify a treaty or to confirm an ambassadorial appointment may have significant, and even grave, foreign policy consequences. It is equally clear that whatever the consequences—and however detrimental the legislation or Senate action may be to the foreign relations of the United States in the President's view—the specter of adverse foreign policy consequences does not render such legislative action unconstitutional. By striking down section 214(d) because the Executive believes it has harmful foreign policy consequences, the court of appeals improperly constricted Congress' legitimate exercise of legislative authority.

The court of appeals also abdicated judicial oversight of Executive action. Having linked exercise of the recognition power to effects on foreign policy, the court accepted as "conclusive" the Executive's "view" that section 214(d) would "cause adverse foreign policy consequences," because the Judiciary is "not equipped to second-guess the Executive regard-

ing the foreign policy consequences of section 214(d)." *Id.* at 219-20. Hence, under the court's reasoning, the constitutionality of section 214(d) is entirely dependent on the Executive's view of the statute's potential effect on foreign policy, effectively—and improperly—ceding to that Branch the courts' responsibility to decide the constitutionality of congressional enactments. *See Zivotofsky*, 132 S. Ct. at 1428 ("The Judicial Branch appropriately exercises" the "power to determine the constitutionality of a statute," irrespective of whether the statute touches on foreign affairs or has other political implications, "in a case such as this, where the question is whether Congress or the Executive is aggrandizing its power at the expense of another branch") (internal quotation marks and citation omitted). Indeed, hinging the constitutionality of section 214(d) on the Executive's effectively unreviewable assessment of the statute's foreign policy consequences essentially transforms the issue into a non-justiciable political question committed to the Executive—a conclusion this Court expressly rejected when this case was last before it. *Id.* ("[T]here is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute.").

In sum, the court of appeals, by mistakenly equating an effect on foreign policy with intrusion on the recognition power, failed to subject the Executive's assertion of exclusive power over birthplace listings in passports to the exacting scrutiny called for by Justice Jackson in *Youngstown*, thereby allowing the Executive to disregard a statute properly enacted in the exercise of Congress' powers

over matters of naturalization and foreign commerce.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below and sustain the constitutionality of section 214(d).

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JULY 2014