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Zivotofsky ex rel. Zivotofsky v. Kerry135 S. Ct. 2076 (2015)

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I. INTRODUCTION

"The power of originally recognizing a new state [is a] power the exercise of which is equivalent, under some circumstances, to a declaration of war."[1] President Andrew Jackson made this observation as Texas pursued recognition as a new sovereign nation.[2] His statement highlights the significance of the act of recognition, which has bearing not only in a potential outbreak of war but also carries certain privileges regarding trade and treatment in a country's legal system.[3] Despite the fact that even during the earliest days of the Republic, American leaders were acutely aware of the importance of formal recognition, they failed to clearly designate which branch of government exercises the "recognition power."[4] Throughout American history, this authority has been exercised by the President alone, by Congress alone, and, at times, by the President and Congress concurrently.[5]

Until *Zivotofsky ex rel. Zivotofsky v. Kerry*,[6] the Supreme Court of the United States had never been called upon to determine whether Congress or the President solely possessed this power.[7] The instigator of the controversy was a small section of the 2003 Foreign Relations Authorization Act, which addressed the place of birth on U.S. passports.[8] Section 214(d) of the Act granted a U.S. citizen born in Jerusalem the right to have the State Department list his or her location of birth as Israel.[9] This provision stood in contrast to the Executive Branch's long-held position to not recognize any nation as possessing formal sovereignty over Jerusalem.[10]

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1. Jean Galbraith, *International Law and Domestic Separation of Powers*, 99 VA. L. REV. 987, 1009 (2013) (quoting Andrew Jackson, Message to Congress Regarding Texas (Dec. 21, 1836), *in* 1 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 99 (1906)).

2. *Id*.; Robert J. Reinstein, *Is the President's Recognition Power Exclusive*?, 86 TEMP. L. REV. 1, 26-28 (2013) [hereinafter Reinstein, *Is the President's*].

3. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2084 (2015).

4. Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of the Executive Power*, 45 U. RICH. L. REV. 801, 836 (2011) [hereinafter Reinstein, *Recognition*]. Early American leaders knew well the significance of recognition as they actively sought it during the War for Independence from Great Britain and afterwards sought formal recognition by other countries so it might secure treaties of friendship and trade. *Zivotofsky*, 135 S. Ct. at 2084.

5. Reinstein, *Is the President's*, *supra* note 2, at 14, 28-29, 42-43.

6. 135 S. Ct. 2076 (2015).

7. Reinstein, *Is the President's*, *supra* note 2, at 4.

8. Foreign Relations Authorization Act, Fiscal Year of 2003, Pub. L. No. 107-228, 116 Stat. 1350, § 214 (2002); *Zivotofsky*, 135 S. Ct. at 2082.

9. *Zivotofsky*, 135 S. Ct. at 2082.

10. *Id*. at 2081.

When Petitioner's parents acted on his behalf to exercise his right under section 214(d), the State Department refused, stating that only the President could formally recognize a sovereign nation and that Congress lacked authority to contradict this position.[11] The Supreme Court ultimately agreed with the State Department's argument, but built its support for this position upon tenuous ground.[12] The Court based its decision on the Constitution, case law, and historical precedent.[13] While these sources offer some support for the Court's conclusion, it appears contrary to the drafters' original intent and finds firmer footing in functionality and practicality than in the Constitution.[14]

A majority of the Court focused on the President's authority to recognize sovereign nations, and framed the issue as whether Congress can pass a law requiring a subordinate part of the Executive Branch to contradict the President.[15] The various dissents disagreed with the manner in which the majority framed the issue, and argued that the recognition power was not challenged here as no one questioned Israel's existence as a sovereign nation.[16] Instead, the dissenters argued that the real issue before the Court concerned whether the President or Congress could regulate passports. [17]

II. STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

In 2002, Menachem Binyamin Zivotofsky (hereinafter "Petitioner") was born in Jerusalem to American citizens.[18] In December of that year, his mother went to the American Embassy in Tel Aviv and sought a consular report of birth abroad and a passport for Petitioner.[19] She requested that Petitioner's place of birth be recorded as Jerusalem, Israel pursuant to section 214 of the 2003 Foreign Relations Authorization Act, entitled "United States Policy with Respect to Jerusalem as the Capital of Israel."[20] Section 214 states, in pertinent part: "For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as

11. *Id*. at 2083.
12. *Id*. at 2096.
13. *Id*. at 2084.
14. Reinstein, *Is the President's*, *supra* note 2, at 58-60.
15. *Zivotofsky*, 135 S. Ct. at 2081.
16. *Id*. at 2097; *Id*. at 2111 (Thomas, J., concurring in the judgment in part and dissenting in part); *Id*. at 2114 (Roberts, C.J., dissenting); *Id*. at 2118 (Scalia, J., dissenting).
17. *Zivotofsky*, 135 S. Ct. at 2097, (Thomas, J., dissenting); *Id*. at 2117-19 (Scalia, J., dissenting).
18. *Id*. at 2083.
19. *Id*.
20. *Id*. at 2082-83; Foreign Relations Authorization Act, § 214.

Israel."[21] The Embassy clerks denied the request, explaining that because the President did not recognize Israeli sovereignty over Jerusalem, the clerks could only list Jerusalem—not Jerusalem, Israel.[22]

As part of the Executive Branch, the State Department aligns its policies for the issuance of passports with the President's official recognition of other nations.[23] For place of birth, the State Department usually lists the sovereign nation exercising control over the area, but if the citizen disputes the sovereignty of that nation, the State Department can list only the city.[24] For instance, a person born in Belfast may request the State Department to list "Belfast" rather than "United Kingdom."[25] However, the State Department will not list a sovereign nation whom the President does not recognize.[26] Although President Truman formally recognized Israel as a nation in 1948, no American president has ever recognized Israeli sovereignty over Jerusalem.[27] For this reason, the State Department considered section 214(d) to be in direct opposition to the Executive Branch's policy since it required the State Department to list "Israel" if a party born in Jerusalem desired that designation.[28]

After the Embassy refused to comply with Petitioner's mother's request, Petitioner's parents brought suit against the Secretary of State in an effort to have the courts enforce the statute.[29] The case first appeared in the District Court of the District of Columbia.[30] The district court dismissed the case for lack of standing and because it considered the issue a political question—whether Israel exercises sovereignty over Jerusalem—which could not be answered by the Judiciary.[31] However, the Court of Appeals for the District of Columbia Circuit reversed, ruling Petitioner did have standing, but agreed with the district court's holding that the issue was a political question and could not be resolved by the Judicial Branch.[32] The Supreme Court of the United States granted certiorari, vacated the judgment, remanded the case, and instructed the appellate court to determine whether Petitioner's interpretation of the statute was correct and whether the statute itself was constitutional, but cautioned the appellate

21. Foreign Relations Authorization Act, § 214(d).
22. *Zivotofsky*, 135 S. Ct. at 2082-83.
23. *Id*. at 2082.
24. *Id*.
25. *Id*. at 2119.
26. *Id*.
27. *Zivotofsky*, 135 S. Ct. at 2081.
28. *Id* at 2082.
29. *Id*. at 2083.
30. *Id*.
31. *Id*.
32. *Zivotofsky*, 135 S. Ct. at 2083.

court to not address the political question of sovereignty.[33] The appellate court subsequently found the statute unconstitutional and held that only the President possessed the authority to recognize a foreign sovereign.[34] Petitioner appealed and the Court granted certiorari a second time.[35] This time, the Court affirmed the decision by the court of appeals and held that the recognition power was solely within the President's authority.[36]

III. COURT'S DECISION AND RATIONALE

A. Majority Opinion by Justice Kennedy

Justice Kennedy authored the majority opinion and was joined by Justices Ginsberg, Breyer, Sotomayor, and Kagan.[37] Justice Kennedy found that this case consisted of two issues: (1) Whether the President exercises exclusive control to formally recognize another sovereign nation, and (2) If the President possesses this power, whether Congress can require the President and his Secretary to issue statements which contradict the President's official position.[38] Since this case concerned Presidential action that conflicted with the will of Congress, Justice Kennedy recognized that the President must have "exclusive" and "conclusive" authority for his action.[39] Presidential power is "at its lowest ebb" when the President acts contrary to the will of Congress and, in this situation, the President can rely solely on the authority the Constitution has granted the Executive Office.[40] Justice Kennedy began his analysis by determining whether the power to formally recognize a foreign sovereign was an exclusive power of the Executive Office.[41]

The Court found the President did possess exclusive authority to formally recognize other sovereigns and reached this conclusion by assessing evidence found within the structure and text of the Constitution that addressed the President's authority in international affairs and by reviewing precedent, historical practice, as well as practicality of engaging in foreign affairs.[42] First, Justice Kennedy turned to the Constitution, but found limited textual support for the theory that the Executive Branch is the

33. *Id*.
34. *Id*.
35. *Id*.
36. *Id*. at 2096.
37. *Zivotofsky*, 135 S. Ct. at 2080-81.
38. *Id*. at 2081.
39. *Id*. at 2084.
40. *Id*. (citing Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J. concurring)).
41. *Id*.
42. *Zivotofsky*, 135 S. Ct. at 2084.

sole possessor of the "recognition power" as the term never appears within the text.[43] Within the Constitution, Justice Kennedy looked to the "Reception Clause" as a Constitutional source for Presidential authority over recognition.[44] The Reception Clause states that the President "shall receive Ambassadors and other public ministers."[45] Justice Kennedy noted that some scholars find this significant in light of the historical context.[46] At the time of America's founding, governments considered the formal reception of another country's ambassador as the equivalent of recognizing that nation's sovereignty; however, during the Constitution's ratification few gave much attention to the Reception Clause.[47] Initially, Alexander Hamilton dismissed the Reception Clause as merely a ministerial duty, but after President Washington formally recognized the new French government by receiving its ambassadors, Hamilton wrote that the clause did in fact authorize the President to formally recognize other nations.[48] Justice Kennedy considered this explanation persuasive and found that since the Constitution charged the President, and only the President, with receiving ambassadors, it implied that the President has authority to recognize sovereign governments.[49]

Next, Justice Kennedy considered the other powers over international affairs that the Constitution granted the Executive Office: the power to make treaties and the power to appoint ambassadors.[50] Although Justice Kennedy acknowledged that these powers were subject to congressional approval, he considered it significant that Congress lacked authority to *initiate* diplomatic relations with foreign nations.[51] Justice Kennedy found that this indicated the Executive Branch was vested with more authority over international affairs than Congress.[52] Justice Kennedy considered these findings conclusive evidence that the President possesses recognition power and then addressed whether it is *exclusive* to the Executive.[53]

To determine the exclusivity of this authority, Justice Kennedy reviewed case precedent and historical practice.[54] He concluded that in light of the lack of examples of Congress exercising this power, and the functional aspect of limiting this power to the Executive Branch, the

43. *Id*.
44. *Id*. at 2085.
45. U.S. CONST. art. II, § 3.
46. *Zivotofsky*, 135 S. Ct. at 2085.
47. *Id*.
48. *Id*.
49. *Id*.
50. *Id*. at 2086.
51. *Zivotofsky*, 135 S. Ct. at 2086.
52. *Id*.
53. *Id*.
54. *Id*.

Executive Branch could exercise unilateral power.[55] Since the Legislature and Executive have never quarreled over this issue before, the Court had limited precedent to consult.[56] First, Justice Kennedy addressed two cases involving disputes between the Federal government's recognition of a sovereign nation and a state's recognition of that nation.[57] In *United States v. Pink*[58] and *United States v. Belmont*,[59] New York courts declined to recognize property seized by the Soviet Government as belonging to Russia despite the fact that President Roosevelt formally recognized the Soviet Government and had entered into agreements with it.[60]

In *Belmont*, the Supreme Court recognized the President's authority to recognize governments and enter into diplomatic relations.[61] In *Pink*, the Court found that because the President had the authority to not only recognize another government but also "the power to determine the policy which is to govern the question of recognition," the states must recognize that government as well.[62] Justice Kennedy admitted that these cases addressed the issue of a conflict between federal and state government and not whether the President has sole authority to formally recognize another sovereign government; however, Justice Kennedy found that these cases supported the contention that recognition power rested solely with the Executive.[63]

Justice Kennedy considered *Banco Nacional de Cuba v. Sabbatino*[64] even more instructive.[65] In this case, the Court refused to assume that ill will between the United States and Cuba sufficed for American *courts* to de-recognize Cuba since the Executive Branch still recognized the Cuban government.[66] The Court also remarked, "Political recognition is exclusively a function of the Executive."[67] As with *Belmont* and *Pink*, Justice Kennedy found that this case provided strong support that the Court had previously determined that the President exercised exclusive authority over the formal recognition power. [68]

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55. *Id*.
56. *Zivotofsky*, 135 S. Ct. at 2088.
57. *Id*.
58. 315 U.S. 203 (1942).
59. 301 U.S. 324 (1937).
60. *Zivotofsky*, 135 S. Ct. at 2088.
61. United States v. Belmont, 301 U.S. at 330.
62. *Zivotofsky*, 135 S. Ct. at 2088 (citing United States v. Pink, 315 U.S. at 229).
63. *Id*. at 2089.
64. 376 U.S. 398 (1964).
65. *Zivotofsky*, 135 S. Ct. at 2089.
66. Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 410.
67. *Zivotofsky*, 135 S. Ct. at 2089.
68. *Id*.

The Secretary of State asserted that based upon *United States v. Curtiss-Wright Export Corp.*,[69] the President possessed "exclusive authority" over *all* diplomatic affairs; however, Justice Kennedy declined to go so far.[70] He recognized that in *Curtiss-Wright* the Court's description of the President's exclusive power was unnecessary for its holding, and despite the case's broad language, the Legislature retains its ability to make laws concerning diplomatic affairs.[71] Nevertheless, Justice Kennedy found that the power to recognize another sovereign belonged exclusively to the Executive Branch and is not subjected to Congress' approval.[72]

Next, Justice Kennedy reviewed historical precedent to support the theory that the President possesses this exclusive authority.[73] Justice Kennedy reviewed President Washington's directions to his ambassador to begin relations with the new French government—without first consulting Congress.[74] The Executive Branch later agreed to receive the new French ambassador, an act that would be a public and official recognition of the new French government—again, without consulting Congress.[75] Justice Kennedy pointed to other instances where Congress deferred to the President's decision, and even found instances where the President remained the party to formally recognize a foreign sovereign even though he had worked in concert with Congress to reach that decision.[76] According to Justice Kennedy, this evidence compelled the conclusion that Congress and the President have historically recognized the President's exclusive authority over the power of recognition.[77]

Moreover, Justice Kennedy found the practicality of only one branch of government exercising this recognition power particularly persuasive. Citing *American Insurance Ass'n v. Garamendi*,[78] Justice Kennedy asserted that the Nation should "speak . . . with one voice" in regards to recognizing a foreign sovereign. [79] Justice Kennedy argued, "only the Executive has the

69. 299 U.S. 304 (1936).
70. *Zivotofsky*, 135 S. Ct. at 2089-90.
71. *Id*.
72. *Id*. at 2090.
73. *Id*. at 2091.
74. *Id*. at 2092.
75. *Zivotofsky*, 135 S. Ct. at 2092.
76. *Id*. at 2092-94. Justice Kennedy attributed Senator Henry Clay's failure to secure recognition for Argentina to Congress's acknowledgement that the President possessed this authority. President Jackson and President and Lincoln both worked in concert with Congress when determining whether to officially recognize new governments (President Jackson dealt with Texas while President Lincoln addressed the new governments of Liberia and Haiti), but Congress left the final act of executing formal recognition to the President.
77. *Id*. at 2094.
78. 539 U.S. 396 (2003).
79. Zivotofsky, 135 S. Ct. at 2086. (quoting American Ins. Ass'n v. Garamendi, 539 U.S. at 424).

characteristic of unity at all times."[80] He stated that the President's ability to engage in more secretive diplomatic relations, which may lead to recognition, and the nature of the President's position, which allows the President to take "decisive, unequivocal action" necessary to recognize a foreign sovereign, justify a finding that the "one voice" should come from the Executive Branch and not the Legislative Branch.[81]

After determining that the President possesses exclusive authority to formally recognize another government and its territory, Justice Kennedy next addressed whether section 214(d) of the Foreign Relations Authorization Act improperly interferes with this authority.[82] Citing *Youngstown Sheet & Tube Co. v. Sawyer*,[83] Justice Kennedy pointed out that if the President has exclusive authority in an area, entailing that Congress has none, then Congress cannot take any action there.[84] Although the recognition power does not prohibit Congress from playing a role in international affairs, this is one area that resides exclusively with the President without congressional interference.[85] Justice Kennedy acknowledged that section 214(d) does not qualify as formal recognition, but because it concerns a political document that was issued by the Executive Branch and requires the President to issue a statement contrary to his official position, it interferes with the President's ability to exercise his exclusive authority and therefore is unconstitutional.[86]

B. Concurring Opinion by Justice Breyer

Justice Breyer maintained his previous position—from his dissent the first time this case reached the Court—that this matter concerned a political question and therefore should not be before the Court.[87] However, based upon the precedent before the Court, he joined in its opinion.[88]

C. Concurring in the Judgment in Part and Dissenting in Part by Justice Thomas

Justice Thomas concurred with the Court's holding that section 214(d) is unconstitutional in regards to the designation of Israel on a passport, but

80. *Id*.
81. *Id*.
82. *Id*. at 2095-96.
83. 343 U.S. 579 (1952).
84. *Zivotofsky*, 135 S. Ct. at 2095 (citing *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring).
85. *Id*.
86. *Id*.
87. *Id*. at 2096 (Breyer, J., concurring).
88. *Id*.

disagreed with the Court's analysis of the recognition power.[89] Justice Thomas argued that Congress could not require the President to list Israel on a passport because the President held the authority to regulate passports—not because he had the authority to recognize other nations.[90] Justice Thomas contended that this case did not concern national recognition at all since listing Israel on a passport has no effect of "formal recognition" because the United States already recognizes Israel as a nation.[91] Justice Thomas pointed out that while the President has long regulated passports under his residual foreign affairs power, Congress lacks any enumerated authority to do so.[92] Therefore, Justice Thomas found that section 214(d) is unconstitutional because Congress lacked authority to enact a statute that interfered with the President's authority to regulate passports.[93]

D. Dissenting Opinion by Chief Justice Roberts

Chief Justice Roberts, joined by Justice Alito, expressed great disapproval of the Court's holding. He considered it an unprecedented expansion of presidential power and, like Justice Thomas, he disagreed with the Majority's finding that this case concerned formal recognition.[94] Chief Justice Roberts joined Justice Scalia's dissent, but wrote separately to address the separation of powers issue.[95] Specifically, he disputed the finding that the President possesses exclusive recognition power. [96]

Chief Justice Roberts pointed to the fact that the Reception Clause was not originally viewed as a source of power and that the other Constitutional support cited to by the majority concerned powers which the President *shares* with Congress.[97] He also took issue with Justice Kennedy's use of case precedent and history, as both presented conflicting instances of both Congress's and the President's understanding of the recognition power. [98] Chief Justice Roberts agreed with Justice Kennedy's finding that the President does possess the authority to recognize a sovereign nation, but he disagreed that this power rested solely with the Executive Branch.[99]

89. *Zivotofsky*, 135 S. Ct. at 2097, 2111(Thomas, J., concurring in the judgment in part and dissenting in part).
90. *Id*. at 2109.
91. *Id*. at 2111-12.
92. *Id*. at 2097-98.
93. *Id*. at 2113.
94. *Zivotofsky*, 135 S. Ct. at 2113-14 (Roberts, C.J., dissenting).
95. *Id*. at 2113.
96. *Id*. at 2113-14.
97. *Id*.
98. *Id*.
99. *Zivotofsky*, 135 S. Ct. at 2114 (Roberts, C.J., dissenting).

The Chief Justice proceeded to argue that even if the President did exclusively possess such power, it remains irrelevant to the case since the statute does not concern recognition.[100] He pointed out that even the majority admitted that section 214(d) was not a formal act of recognition, and that neither Congress nor the President considered it determinative of the formal recognition of Israel.[101] The Chief Justice also noted that while the majority was concerned with Congress passing legislation which would conflict with Presidential decisions in international affairs, Congress was already empowered to do so as it may declare war or even impose an embargo upon a country that the President has formally recognized.[102] Furthermore, Chief Justice Roberts pointed to precedent demonstrating that the President is not permitted to use his foreign affairs authority to "countermand a State's lawful action," and concluded the President cannot "disregard an express statutory directive enacted by Congress."[103]

E. Dissenting Opinion by Justice Scalia

Justice Scalia, joined by Chief Justice Roberts and Justice Alito, disagreed with the Court's finding that section 214(d) is unconstitutional because, in his view, the case did not concern recognition power at all, but rather Congress's passport authority.[104] Justice Scalia argued that formal recognition of a foreign sovereign is a significant and lofty policy decision and one this passport policy did not ascend to.[105] He emphasized the fact that section 214(d) does not affect the United States' formal position of recognizing the nation of Israel, nor does it extend official recognition to Israeli sovereignty over Jerusalem—a point the Court conceded.[106] Even if the President had exclusive authority to grant formal recognition, Justice Scalia contended that Congress has authority to instruct the State Department on how to record one's place of birth on a passport.[107]

Rather than addressing the recognition power in detail, Justice Scalia focused on Congressional authority over passports and whether the issue of recognition even arises.[108] He argued that Article I establishes Congress' authority to "establish an [sic] uniform Rule of Naturalization."[109] Justice Scalia claimed that since this power enables Congress to grant citizenship to

100. *Id*.
101. *Id*.
102. *Id*. at 2115.
103. *Id*. at 2116 (citing *Medellin*, 552 U.S. at 523-320).
104. *Zivotofsky*, 135 S. Ct. at 2117-18 (Scalia, J., dissenting).
105. *Id*. at 2118.
106. *Id*. at 2095, 2118-19.
107. *Id*. at 2120.
108. *Id*. at 2117-19.
109. *Zivotofsky*, 135 S. Ct. at 2117 (Scalia, J., dissenting) (citing U.S. CONST. art. I, § 8, cl. 4.).

those abroad, Congress may rightfully issue travel documents which serve to designate citizenship, such as a passport.[110] Thus, Congress' decision to permit an American citizen to designate Israel as his or her place of birth falls within this authority.[111]

Justice Scalia also pointed to historical precedent to demonstrate that Congress has made declarations regarding territorial sovereignty in the past.[112] In his mind, Congress properly used its authority in enacting section 214(d) to make a statement regarding its support for the Israeli claim to Jerusalem, but one that did not ascend to the level of formal recognition.[113] Unlike Justice Kennedy, Justice Scalia did not find that historical precedent necessitated a finding that the President possesses exclusive authority to formally recognize nations, as he presented his own list of examples where Congress had recognized or even ordered the President to recognize certain governments or territorial claims.[114]

IV. ANALYSIS

A. Introduction

Prior to *Zivotofsky*, the Court had never been required to determine whether the Executive Branch or Legislative Branch would return victor should they disagree over the formal recognition of another sovereign.[115] While the dissenting justices dispute that the Court needed to resolve this issue here, the Court did just that.[116] The Court established that the Executive Branch possesses exclusive authority to grant formal recognition of another sovereign and prohibited Congress from interfering with such exclusive authority.[117]

The Court's decision fell under Justice Jackson's tripartite scheme for assessing presidential power.[118] Under this framework, the President's power is at its "lowest ebb" if he intends to act in a manner contrary to the will of Congress since the President's power in this situation is limited to his constitutionally explicit power minus any power Congress might exert

110. *Id*. at 2117.
111. *Id*.
112. *Id*. at 2120-21.
113. *Id*. at 2117, 2123.
114. *Zivotofsky*, 135 S. Ct. at 2117-19 (Scalia, J., dissenting). Justice Scalia referenced Presidents Jackson's and Lincoln's reluctance to exert the recognition power independently of Congress. He also described Congress's actions in 1939 which required the President to recognize the Philippines as an independent nation.
115. *Id*. at 2088.
116. *Id*. at 2094, 2111 (Thomas, J., concurring in the judgment in part and dissenting in part); *Id*. at 2114 (Roberts, C.J., dissenting); *Id*. at 2118 (Scalia, J., dissenting).
117. *Zivotofsky*, 135 S. Ct. at 2096.
118. *Id*. at 2083-84; *see Youngstown*, 343 U.S. at 635-38.

over that area.[119] As Justice Jackson warned in *Youngstown*: "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."[120]

This Note will focus on the strength of the justifications the Court used to support its finding of exclusive authority by reviewing the Constitution's language and historical context, case law, and historical precedent of formal recognition by the United States.[121] This Note will also briefly address potential implications for future international affairs.[122]

B. Defining the President's Recognition Power

1. The Reception Clause

While the Court found that the recognition power belonged exclusively to the President and considered now an opportune time to recognize it as a "bright line" rule, case law, and historical precedent suggest the line is not so "bright."[123] In *Youngstown*, the Court found that, "[t]he President's authority to act as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'"[124] This places a significant burden on the Court's analysis of the Constitution in regards to this power.

First, the Court looked to the Constitution and focused on the "Reception Clause" as textual support for the President's authority to recognize foreign governments, but this is a less than compelling source.[125] The Reception Clause, found in section 3 of Article II, simply states, "[the President] shall receive ambassadors and other public ministers."[126] Section 3 contains a list of duties rather than powers, which is indicative that the Reception Clause may be classified more appropriately as a ministerial duty.[127]

The Court also discussed the historical political context and found that contemporary governments considered the receipt of an ambassador equivalent to granting formal recognition to another country. [128] While it seems like a simple way to identify this authority, the Court acknowledged,

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119. *Youngstown*, 343 U.S. at 638.
120. *Id*.
121. *See infra* Parts IV.B.1-4.
122. *See infra* Part IV.B.5.
123. *Zivotofsky*, 135 S. Ct. at 2088.
124. Medellin v. Texas, 552 U.S. 491, 491 (2008) (quoting *Youngstown*, 343 U.S. at 585).
125. Reinstein, *Recognition*, *supra* note 4, at 842-51.
126. U.S. CONST. art. II, § 3.
127. Reinstein, *Recognition*, *supra* note 4, at 812-13.
128. *Zivotofsky*, 135 S. Ct. at 2084.

but then ignored, the historical factors that strongly indicated the founders did not intend to vest the president with recognition power through the Reception Clause.[129] A review of the historical events and the documents surrounding the ratification of the Constitution indicates that the Reception Clause did not constitute a delegation of the recognition power to the president.[130]

During the Federal Convention, the delegates repeatedly stated that Executive power should be limited to avoid recreating a strong monarch position.[131] James Madison proposed that they "fix the extent of the Executive authority".[132] Madison further stated that "the powers should be confined and defined."[133] Throughout the rest of the convention, the delegates continued with this undisputed theme of avoiding a strong monarch-like executive and specifying what powers would be attributed to this position.[134]

The act of formal recognition carried a significance that was not lost on the early leaders.[135] The United States knew recognition by the European nations was imperative for its establishment.[136] Formal recognition not only served to legitimize America's existence as a political body, but also provided critical support to American trade.[137] Receiving France's recognition of the United States during the War of Independence had been a significant if not definitive moment for the new nation.[138] The early leaders knew this power was potent, so if they chose to delegate it to the President it seems like it would have been natural to list it as a "defined" power.[139] While the Court suggested that the Reception Clause is such a specification, the nature of the discussion and debates over the Constitution's ratification do not support this.[140]

At a time when the Anti-Federalists hotly contested any authority granted to the Executive Branch, they remained silent on the "Reception Clause."[141] Even Hamilton's spirited call at the Constitutional Convention

129. *Id*. at 2084-85.
130. Reinstein, *Recognition*, *supra* note 4, at 861-62.
131. Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 593 (2004).
132. *Id*. at 594.
133. *Id*.
134. *Id*.
135. Reinstein, *Is the President's*, *supra* note 2, at 9.
136. Reinstein, *Recognition*, *supra* note 4, at 836.
137. Reinstein, *Is the President's*, *supra* note 2, at 9.
138. David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, The Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 936-37 (2010).
139. Reinstein, *Recognition*, *supra* note 4, at 857-60.
140. *Id*. at 857-59.
141. *Id*. at 859.

for a strong Executive failed to mention it as one of the powers granted to the President.[142] In Federalist No. 69 of the Federalist Papers, Hamilton, a strong supporter of Executive power, called the President's reception of foreign ambassadors a ministerial duty and not one of authority.[143] As the Court noted, after President Washington welcomed the new French government's ambassador, Hamilton changed his position and stated the President did in fact have the authority to recognize other nations.[144] This appeared to be an *ad hoc* position and suspect interpretation for the original intent of the Reception Clause. [145] In the Federalist Papers, the authors again stated that the Executive would only possess powers that were specifically granted to it, yet the Reception Clause received little notice. [146] If the powers granted to the Executive Branch were being closely scrutinized it would be odd for one with such weight to pass completely unnoticed.[147] Recognized scholar Professor Reinstein posits that the Constitution does not address this power and the silence may stem from the fact that as a new nation the United States was concerned about being recognized by other nations, but any consideration of whether the United States would recognize another country was not a relevant issue—who would seek its recognition?[148] The Court found Hamilton's altered position as the appropriate interpretation for the Reception Clause, but this is difficult to justify.[149]

2. Enumerated Presidential Powers

In seeking further constitutional support, the Court focused on the fact that only the President may initiate diplomatic relations.[150] While this is true, these powers remain subject to the approval of Congress. [151] The Court has held that in order for the Executive to exercise a power it must be enumerated in the Constitution or be granted to it by Congress, but the Reception Clause provides a weak foundation for suggesting that the recognition power belongs to the President, let alone that it belongs solely to the President. [152]

142. *Id*. at 842-44.
143. *Id*. at 815-16.
144. *Zivotofsky*, 135 S. Ct. at 2085.
145. Galbraith, *supra* note 1, at 1012.
146. Bradley & Flaherty, *supra* note 131, at 602.
147. Reinstein, *Recognition*, *supra* note 4, at 860.
148. *Id*. at 860-61.
149. *Zivotofsky*, 135 S. Ct. at 2085; *see* Reinstein, *Recognition*, *supra* note 4, at 860-61.
150. *Zivotofsky*, 135 S. Ct. at 2085-86.
151. *Id*. at 2114 (Roberts, C.J., dissenting).
152. *Medellin*, 552 U.S. at 491; *Youngstown*, 343 U.S. at 585.

3. Court Precedent

Justice Kennedy drew on several cases from the last century to provide support for his decision on Executive authority.[153] The dicta in these cases allude to a strong Executive, but as Chief Justice Roberts pointed out, Justice Kennedy also cited dicta in other cases which support a finding that the Executive shares this power with Congress.[154] In both *Pink* and *Belmont* the Court recognized that the national government possessed the power to enter into international compacts and therefore these compacts were binding upon the states.[155] These cases contrasted national and state power, not executive versus legislative power. [156] Although *Pink* and *Belmont* both contained dicta supporting Executive authority to make formal recognitions, these cases did not specifically concern formal recognition; they merely concerned federalism issues.[157]

In *Banco Nacional de Cuba*, the Court discussed whether the Judiciary had authority to "derecognize" a government contrary to explicit Executive action.[158] The dispute concerned *Judicial* versus Executive power—not *Legislative* versus Executive.[159] Additionally, the Court has consistently found that recognition is a political question and therefore the Judicial Branch cannot resolve it, but this does not determine whether the Executive Branch possesses this power to the exclusion of the Legislative Branch.[160]

In addition to the cases cited above, the Court has affirmed the authority of both the Executive and Legislative Branches to recognize foreign governments elsewhere. In *United States v. Palmer*,[161] the Supreme Court noted that courts must recognize a foreign government on the basis of a decision made by the Executive and Legislative Branches.[162] Justice Kennedy argued that dicta supporting a finding that the Legislative and Executive Branches both exercise this authority concerned cases where the Court determined that the Judicial Branch does not establish that determination.[163] If this discredits those cases as having any bearing on the present issue, it should also discredit *Banco Nacional de Cuba*, as that was the issue at hand when the Court condoned Executive authority to exercise

153. *Zivotofsky*, 135 S. Ct. at 2088-89.
154. *Zivotofsky*, 135 S. Ct. at 2114 (Roberts, C.J., dissenting).
155. *Id*. at 2088-89; *Belmont*, 301 U.S. at 330-1; *Pink*, 315 U.S. at 229, 232.
156. *Zivotofsky*, 135 S. Ct. at 2088-89.
157. *Id*. at 2089.
158. *Banco de Nacional de Cuba*, 376 U.S. at 410-11.
159. *Id*.
160. *Zivotofsky*, 135 S. Ct. at 2088, 2091; *see* Williams v. Suffolk, 13 Pet. 415, 420 (1839); Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918); Jones v. United States, 137 U.S. 202, 202 (1890).
161. 16 U.S. 610 (1818).
162. *Id*. at 643.
163. *Zivotofsky*, 135 S. Ct. at 2091.

the recognition power.[164] As Chief Justice Roberts pointed out in his dissent, if conflicting dicta is the best support one can rally, it is difficult to claim victory through precedent. [165]

4. Historical Precedent

The Court also pointed to historical precedent to support its holding. [166] The Court admitted that there was historical evidence on both sides of the debate, but believed the balance leaned in favor of its holding.[167] The Court has previously cautioned that "[p]ast practice does not, by itself, create power."[168] It is true that there are numerous examples of the President acting alone to recognize another sovereign, but there are also examples of Congress recognizing states concurrently with the President and of its own authority, which contradicts a finding that the President has exclusive recognition power.[169]

The Court cited President Washington's executive decision to receive the ambassador for the new French government as evidence that Washington understood the recognition power to belong exclusively to the President since he did not consult Congress on the matter.[170] This, however, misinterprets the President's actions because rather than assert his own will, President Washington and his Cabinet sought to determine what the *law of nations* instructed as to the recognition of another country and how to maintain neutrality.[171] Ultimately, President Washington decided to adopt Emmerich de Vattel's doctrine of the de facto recognition, which stated that governments had an obligation to recognize the authority of the government with "actual possession" of power.[172]

Chief Justice Jay affirmed this decision stating that the United States had no choice but to abide by the law of nations and recognize the new controlling French government.[173] Since this decision was rooted in the law of nations, President Washington exercised his executive authority to enforce the law of nations—not the recognition power.[174] Even after President Washington implemented this decision, he twice presented statutes before Congress for approval when it appeared that the law of

164. *Banco Nacional de Cuba*, 376 U.S. at 410-11.
165. *Zivotofsky*, 135 S. Ct. at 2114 (Roberts, C.J., dissenting).
166. *Id*. at 2091.
167. *Id*.
168. *Medellin*, 552 U.S. at 531-32 (quoting Dames & Moore v. Regan, 453 U.S. 654, 686 (1981)).
169. Reinstein, *Is the President's*, *supra* note 2, at 50-51.
170. *Zivotofsky*, 135 S. Ct. at 2092.
171. Reinstein, *Is the President's*, *supra* note 2, at 11.
172. Reinstein, *Recognition*, *supra* note 4, at 840.
173. Reinstein, *Is the President's*, *supra* note 2, at 12.
174. *Id*.

nations did not provide the needed authority for the President to reach his desired objectives.[175] Professor Reinstein writes that the President's actions in this affair illustrate that President Washington recognized "he was exercising power that was concurrent with, and ultimately subordinate to, the will of Congress."[176]

Recognition arose again during the subsequent Adams and Jefferson administrations.[177] In 1800, Congress passed a law recognizing French sovereignty over Santo Domingo.[178] In 1806, Congress passed another law that rejected the Haitian claim of independence, continued to acknowledge French sovereignty over the island, and forbade Americans from trading with any person or persons who resided in a part of the island that did not recognize French sovereignty.[179] In 1809, Congress passed a similar law applying to France and Great Britain, and their colonies and dependents. [180] Later that year, an American merchant challenged the statute's validity in federal court.[181] The merchant argued that, under the law of nations, the doctrine of recognition directed the United States to recognize Haitian independence and permit American citizens to freely trade with the island.[182] While the district court agreed with the merchant's analysis, it held that since *Congress* had enacted the statute, which recognized French rather than Haitian sovereignty, the nation and its citizens were bound by that determination.[183] President Jefferson had previously issued directives, which also declined to recognize Haitian independence, but the court looked only to Congress's statute.[184] An examination of the statute's legislative history revealed that Congress also did not consider the President's directive and even went counter to President Jefferson's policy on trade.[185] In support of his contention in *Zivotofsky*, Justice Kennedy pointed to congressional dispute over recognizing Latin American insurgents' independence and determined that Congress defeated Henry Clay's efforts to grant recognition because it deferred to President Monroe's executive authority.[186] A look at the events indicates that partisan politics,

175. *Id*. at 13.
176. *Id*. at 13-14.
177. *Id*. at 14.
178. Reinstein, *Is the President's*, *supra* note 2, at 15.
179. *Id*.
180. *Id*. at 15.
181. *Id*. at 17; *see* Clark v. United States, 5 F. Cas. 932 (C.C.D. Pa. 1811) (No. 2,838). Clark had received goods from which were in turn seized by the United States. In support of his claim that Haitian independence should be recognized, he pointed to Vattel's doctrine of sovereignty, which President Washington had used as justification for recognized French independence.
182. Reinstein, *Is the President's*, *supra* note 2, at 17.
183. *Id*. at 17-18.
184. *Id*. at 18.
185. *Id*.
186. *Zivotofsky*, 135 S. Ct. at 2092.

international law, and foreign politics probably played a larger role in the defeat of the motion rather than congressional acknowledgment of Presidential power.[187]

Events shortly after the Latin American dispute also tend to undermine Justice Kennedy's argument for exclusive power.[188] During the Texan quest for independence from1836-1837, President Jackson, a proponent of a strong Executive Branch, was confronted with the issue of which branch possessed the recognition power.[189] Congress wished to recognize Texas as an independent country, and President Jackson opposed it.[190] Instead of asserting authority, Jackson stated that he did not know who had the authority to recognize a foreign nation, gave his reasons for why he disfavored the action, and then deferred to Congress' judgment on the matter.[191]

President Jackson's uncertainty is important, because his Secretary of State was John Forsyth, whom had been a major supporter of President Monroe during the dispute over recognition in Latin America.[192] If the question of executive authority had been the primary determinative factor during those debates, it is baffling as to why President Jackson would state that Congress had not made a "deliberate inquiry" into who exercised this authority.[193] Jackson instead stated that, in keeping with the Constitution, it was more appropriate for Congress to make the determination because Congress possessed authority to declare war and recognition could be considered an act of war.[194] Congress repeated its desire to recognize Texas, but crafted its statute so that recognition (by sending an agent) would only be appropriated when the President determined that Texas was an independent sovereign.[195] The two branches worked cooperatively in this instance, but it is worth noting that President Jackson made no attempt to assert *exclusive* executive authority. [196] These early examples support a finding of concurrent power rather than exclusive executive authority.

President Lincoln, another proponent of a strong Executive Branch, also sought congressional action when he wanted to recognize Haiti and Liberia.[197] Congress responded by enacting legislation that recognized both

187. Reinstein, *Is the President's*, *supra* note 2, at 19-24.
188. *Id*. at 26, 30.
189. *Id*. at 26-28.
190. *Id*.
191. *Id*. at 27-28.
192. Reinstein, *Is the President's*, *supra* note 2, at 28.
193. *Id*.
194. *Id*. at 28-29.
195. *Id*. at 29.
196. *Id*. at 29-30. There are several reasonable explanations for President Jackson's actions. However, Jackson's actions remain inconsistent with a finding of exclusive executive recognition power.
197. Reinstein, *Is the President's*, *supra* note 2, at 30.

countries.[198] In requesting Congress to recognize these countries, President Lincoln neither denied nor asserted his own power to do so, but he clearly acknowledged Congress's power.[199] The debates over the legislation included mention of the President's ability to grant recognition at his own choosing, but there is no discussion over whether Congress has this power as well, which indicates that it was assumed.[200]

In 1898, Congress passed a resolution recognizing Cuba's freedom from Spain.[201] Although President McKinley opposed the decision, he signed it nevertheless—another acknowledgement of congressional authority.[202] From 1898-1979, presidents exercised the recognition power without any comment or opposition from Congress.[203] In 1979, Congress passed the Taiwan Relations Act, which determined the government policy for engaging Taiwan and was actually contrary to President Carter's official position of declining to recognize either the People's Republic of China's sovereignty over Taiwan or Taiwanese self-governance.[204] The Taiwan Relations Act essentially gave Taiwan all the rights of a sovereign and it laid out the implementation of the President's recognition of the People's Republic of China and the de-recognition of the Republic of China.[205] Congress did not favor President Carter's de-recognition of the Republic of China (Taiwan), but no one questioned his authority.[206] Neither did the President veto Congress' Taiwan Relations Act, which abided by his act of recognition on the surface, but in reality, provided the rights and privileges that would have accompanied formal recognition of Taiwan.[207] It is undisputed that presidents have exercised the recognition power, but history does not support a finding of *exclusive* authority.[208]

The *Zivotofsky* Court's concern about functionality and practicality is reasonable, but it seems to be grasping to make a decision for exclusive executive power in a place where the Constitution is silent.[209] The Founders were very careful in their delegation of authority.[210] The division of power

198. *Id*.
199. *Id*. at 30-31.
200. *Id*. at 31-32.
201. *Id*. at 35.
202. Reinstein, *Is the President's*, *supra* note 2, at 135-36.
203. *Id*. at 41.
204. *Id*. at 43-46, 55-56.
205. *Id*. at 48.
206. *Id*. at 46, 48.
207. Reinstein, *Is the President's*, *supra* note 2, at 48.
208. *Id*. at 50.
209. Reinstein, *Recognition*, *supra* note 4, at 861-62.
210. Bradley & Flaherty, *supra* note 131, at 593.

was intended to protect the people from a repeat of tyrannical power, but with it may come the loss of speaking with unity.[211]

5. Future Implications of Exclusive Executive Recognition Power

By ruling that only the President can exercise the recognition power, the Court denies Congress any authority to do so.[212] How far this limitation on congressional authority will extend is open to speculation. The Executive has been the primary branch administering the recognition power throughout history, so this may seem to have little effect on the status quo.[213] However, as Justice Scalia pointed out in his dissent, Congress has expressed its own position on the legitimacy of different government's sovereignty in the recent past.[214]

In 1991, Congress authorized the use of military force against the Iraqi invasion of Kuwait and, in the preamble of its resolution, Congress declared Iraq's occupation "illegal" and recognized the Kuwait government's legitimacy as opposed to Iraqi sovereignty and governance over the area.[215] Furthermore, Congress has issued a statement declaring that it recognizes the Dalai Lama and the Tibetan government in exile as the rightful rulers of Tibet.[216] The House of Representatives also passed a resolution recognizing the democratically elected government of Syria as the rightful government and refused to recognize Hezbollah's legitimacy as a governing body.[217] What would be the purpose of Congress issuing any of these prior statements if recognition belonged to the President *alone*? Indeed, this decision could be construed to prevent Congress from making any such statement in the future. As the Court admitted, section 214(d) does not even reach the height of recognition, so how far beneath that power does executive authority extend?[218]

Moreover, if the President's authority restricts Congress from making statements that do not qualify as formal recognition, then where is the actual line for assessing what positions Congress may take regarding international affairs? Must Congress always take action in keeping with the President? In the Taiwan Recognition Act, Congress dictated American policy for interactions with Taiwan, including trade and the application of American

211. *Id*. at 594; Reinstein, *Is the President's*, *supra* note 2, at 59.
212. *Zivotofsky*, 135 S. Ct. at 2096.
213. Reinstein, *Is the President's*, *supra* note 2, at 50-51.
214. *Zivotofsky*, 135 S. Ct. at 2120-21 (Scalia, J., dissent).
215. *Id*. at 2120.
216. *Id*. at 2121.
217. *Id*.
218. *Id*. at 2095.

laws, and established that privileges granted to recognized states would also apply to Taiwan—all of which ran counter to President Carter's intent to not grant formal recognition.[219] Would Congress be restrained in the future from promulgating American foreign policy in a similar situation if Congress adopted policies inconsistent with the President's official position?

V. CONCLUSION

Youngstown stands for the proposition that for the Executive to act contrary to the will of Congress he must have exclusive and preclusive authority to do so, meaning Congress has no authority in the area.[220] In *Youngstown* the Court also held that this authority "must stem either from an act of Congress or from the Constitution itself."[221] While it is clear and accepted that the President has the ability to recognize foreign powers, the Constitution and historical precedent do not support a finding that this authority precludes any check by Congress.[222] The spirit of the Constitution was to ensure a check on each of the governmental branches through the division of powers.[223] The founders were particularly concerned about granting too much power to the Executive Branch, and the Constitution's structure does not support a finding of exclusive Executive recognition power.[224] The establishment of an exclusive executive power not enumerated in the Constitution should have stronger support than that offered by Justice Kennedy; it appears that Justice Kennedy focused on a desire for the country to speak with "unity" on the issue of recognition and the functional benefits of such a decision.[225] While these goals may be obtained, they appear to supplant the founders' efforts to maintain checks and balances on government.[226]

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219. Reinstein, *Is the President's*, *supra* note 2, at 43-45.
220. *Youngstown,* 343 U.S. at 637-38.
221. *Id*. at 585.
222. Reinstein, *Is the President's*, *supra* note 2, at 60.
223. *Id*. at 58-59.
224. *Id*. at 58.
225. *Zivotofsky*, 135 S. Ct. at 2086.
226. Reinstein, *Is the President's*, *supra* note 2, at 58-59.