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Three's a Crowd: Jerusalem, Congress, and the Seemingly Omnipotent Executive

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I. Introduction

Imagine living as Tom Hanks in the movie “The Terminal.”¹ You arrive at JFK International Airport, only to find your passport is not valid because the United States no longer recognizes your birthplace as a sovereign nation. Denied from entering U.S. territory, you wander the airport—lacking money, lacking a home, and lacking an identity. To some extent, American citizens born in Jerusalem face this same identity crisis. Jerusalem has been the

¹ See THE TERMINAL (Amblin Entertainment June 18, 2004).

subject of a tug-of-war for centuries, claimed by many as not only the center of religion but also as a state capital.² At the same time, Jerusalem sits in isolation, unrecognized in modern history as belonging to any nation.³ The United States recognizes no state as having sovereignty over Jerusalem, instead treating the ultimate determination of Jerusalem's status as a matter to be resolved between the Israelis and Palestinians.⁴

Although less drastic than eternally wandering an airport, ten-year-old Menachem Binyamin Zivotofsky, along with 50,000 other American citizens, has lived the entirety of his short life in a “terminal” of sorts simply because he was born in Jerusalem.⁵ Menachem, an American citizen by virtue of his parent's American citizenship, was denied the simple right, afforded to most United States citizens, of having his country of birth listed on his passport and Consular Reports of Birth.⁶ Because he was born in Jerusalem, Menachem is instead set apart, with his documents displaying only “Jerusalem” as his birthplace.⁷ In some sense, by American standards, Menachem lives in a “no-man's land,” having no country of birth with which to identify.

Congress attempted to remedy Zivotofsky's situation by enacting § 214(d) of the Foreign Relations Authorizations Act, Fiscal Year 2003, and affording the approximate 50,000 American citizens born in Jerusalem the right to list “Israel” as their place of birth. This right was short-lived, however, and Menachem was never allowed to list “Israel” as his place of birth because of the Department of State's refusal to enforce the statute. Instead, a legal battle ensued and still continues today.

²Ian J. Bickerton & Carla L. Klausner, A HISTORY OF THE ARAB-ISRAELI CONFLICT 396 (6th ed. 2010).

³*Id.*

⁴Brief for the Appellee at 3–4, *Zivotofsky ex rel. Zivotofsky v. Clinton*, No. 07-5347 (D.C. Cir. Oct. 10, 2012).

⁵See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) [hereinafter *Zivotofsky I*].

⁶*Id.* at 1425.

⁷*Id.*

Menachem's fate currently sits with the D.C. Circuit Court of Appeals, which is in the unenviable position of determining an issue of first impression that will lead to political strife regardless of the position it takes. The issues in this case implicate not only the balance of power between two federal branches of United States government, but also foreign policy, national security, and geopolitical relations that go beyond a simple word on a passport. The D.C. Circuit must carefully investigate constitutional issues affecting separation of powers dating back to the United States's inception.

This Comment analyzes separation of powers between Congress and the executive as it relates to § 214(d). Part II introduces the circumstances leading to the current question before the D.C. Circuit—whether Congress had the power to pass § 214(d) as appropriate passport legislation or whether it is an impermissible encroachment on executive power. Part III examines whether the power over passports belongs to Congress, the President, or both by introducing a framework for scrutinizing separation of powers' conflicts. Additionally, Part III considers the passport power's relationship with the Constitution's "receive ambassadors" clause, which grants the President authority to recognize foreign sovereigns. After analyzing § 214(d) to determine whether it conflicts with the President's recognition authority in Part IV, Part V introduces the unitary executive theory, a concept that seeks to define the scope of executive power. Part V also examines the unitary executive theory's effect on the President's authority to recognize foreign sovereigns. This analysis of the recognition clause as it relates to the unitary executive theory seeks to establish one critical point. The common understanding of the power to receive ambassadors undermines the system of checks and balances among the federal branches and must therefore be reassessed in order to reaffirm presidential accountability.

These points of analysis lead to the conclusion, which argues that § 214(d) is should be upheld as a check on executive authority.

II. Background

A. Act 1: Framing the Conflict

The status of Jerusalem is one of the most emotionally charged and sensitive issues to be resolved in the Arab-Israeli conflict. The key to understanding the conflict over Jerusalem is recognition of the “different geographical concepts” favored by the two sides.⁸ Palestinians claim East Jerusalem, including the Old City, as the capital of a Palestinian state. Israel refuses to relinquish control or divide its “eternal capital.”⁹ For the last sixty years, the United States has maintained a policy of taking “no official act recognizing Israel’s or any other state’s claim to sovereignty” over Jerusalem because of the executive’s assessment that any action taken to recognize Jerusalem as within the sovereign territory of one nation would compromise the United States’s ability to work with the parties in the peace process.¹⁰ According to the government, the United States implements this policy in part by placing restrictions on place-of-birth designations in consular reports of birth abroad and passports issued to American citizens born in Jerusalem.¹¹ Where other passports list the country of birth as the citizen’s birthplace, the passports of Americans born in Jerusalem list only “Jerusalem.”¹²

In 2002, Congress attempted to change the government’s policy by enacting the Foreign Relations Authorization Act, Fiscal Year 2003 (“Act” or “the Act”).¹³ Section 214 of the Act is entitled “United States Policy with Respect to Jerusalem as the Capital of Israel.”¹⁴ Section

⁸ Bickerton & Klausner, *supra* note 2, at 396.

⁹ *Id.*

¹⁰ Brief for the Appellee, *supra* note 4, at 3–4.

¹¹ *Id.* at 4.

¹² *Id.*

¹³ See FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 2003, PL 107–228, Sept. 30, 2002, 116 Stat 1350.

¹⁴ *Id.* at 1365–66.

214(a) contains a “Congressional Statement of Policy,” which reaffirms Congress’s commitment to relocating the United States Embassy in Israel from its current location in Tel Aviv to Jerusalem and urging the President to begin the process of relocation.¹⁵ Section 214(b) limits funding of United States’ diplomatic facilities in Jerusalem to those under the supervision of the United States Ambassador to Israel.¹⁶ Section 214(c) forbids the use of funds appropriated by the Act in publication of official government documents listing countries and their capitals unless the publication identifies Jerusalem as the capital of Israel.¹⁷ Section 214(d), the only provision at issue in this case, states:

Record of Place of Birth As Israel for Passport Purposes.—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 [of State] shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.¹⁸

In signing the Act into law, President George W. Bush stated his belief that § 214(d) is unconstitutional because it impermissibly interferes with the President’s constitutional authority to “formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states.”¹⁹ The President emphasized that there was no change in United States policy regarding Jerusalem due to § 214’s enactment.²⁰

President Bush referred to the executive’s recognition power in his signing statement to argue that § 214(d) is unconstitutional. Derived from Article II, § 3 of the Constitution, the recognition power gives the President the authority to “receive [foreign] Ambassadors and other

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ George W. Bush, *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, The American Presidency Project (Sept. 30, 2002), <http://www.presidency.ucsb.edu/ws/index.php?pid=63928>.

²⁰ *Id.*

public ministers.”²¹ This authority traditionally included the ability to recognize or not recognize a foreign state or government. The recognition power implicates birthplace designation in passports and consular reports of birth because, as a general rule, the United States Department of State records the country it recognizes as having sovereignty in the place of birth slot in passports.²² Where the United States does not recognize a particular nation’s sovereignty, the country name is not recorded.²³

B. Act 2: *Zivotofsky v. Clinton*

Menachem Binyamin Zivotofsky was born in Jerusalem shortly after § 214 was enacted to two American parents, making him a United States citizen by virtue of his parents’ citizenship.²⁴ His mother filed an application for a consular report of birth abroad and a United States passport, requesting that “Jerusalem, Israel” be recorded as his place of birth.²⁵ In response, U.S. officials informed her that State Department policy forbids recording “Israel” as her son’s place of birth.²⁶ Pursuant to United States policy, the State Department issued a

²¹ U.S. CONST. ART. II, § 3.

²² 6 Immigration Law Service 2d PSD Foreign Affairs Manual 1300 APP D (“[T]he country that currently has sovereignty over the actual place of birth is listed as the place of birth, regardless of when the birth occurred... For a location whose sovereignty is in dispute, is not yet resolved, or is not recognized by the United States, this appendix provides specific guidance.”).

²³ *Id.* Similarly, an applicant objecting to listing a country that currently has sovereignty has the option of listing the city of birth. *Id.* For example, a citizen born in undisputed Israeli territory who objects to having “Israel” listed may instead list the his or her city of birth. If the person was born prior to Israel’s inception in 1948, he or she may list “Palestine.” The Foreign Affairs Manual also lists various options for American citizens born in disputed Israeli—Palestinian territory. *Id.* For example, a person born in the Gaza Strip or West Bank may list “Gaza Strip,” “West Bank,” “Palestine” if born prior to 1948, or the city or town of birth. *Id.* A person born in the Golan Heights may list “Syria” or the city or town of birth. *Id.* Also, a person born in Jerusalem prior to 1948 may list “Palestine.” *Id.*

²⁴ 8 U.S.C. §§ 1401(c)–(d) (“The following shall be nationals and citizens of the United States at birth: . . . (c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person; (d) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States.”); *see also* *Rogers v. Bellei*, 401 U.S. 815, 835 (1971) (“children of American citizens born outside the United States acquire citizenship at birth through “congressional generosity”).

²⁵ *Zivotofsky I*, 132 S. Ct. at 1425.

²⁶ *Id.*

passport and consular report of birth abroad listing only “Jerusalem” as Zivotofsky’s birthplace.²⁷

Zivotofsky’s parents filed a complaint against the Secretary of State on his behalf, seeking a declaratory judgment and a permanent injunction ordering the Secretary of State to identify “Jerusalem, Israel” as his place of birth in his official documents.²⁸ The District Court dismissed the case, after the parties agreed that the issue should be whether § 214(d) entitled Zivotofsky to have “Israel” rather than “Jerusalem, Israel” listed as his birthplace, on the grounds that the complaint presented a nonjusticiable political question.²⁹ The court reasoned that resolution of the issue would “necessarily require the Court to decide the political status of Jerusalem.”³⁰ The Court of Appeals for the D.C. Circuit affirmed, reasoning that the Constitution grants to the executive the exclusive power to recognize foreign sovereigns, an exercise of power not reviewable by the courts.³¹ One judge sitting on the panel, Judge Edwards, believed the majority and the District Court were incorrect and analyzed the issue in a concurring opinion. Judge Edwards determined that the issue was justiciable and that Congress lacked constitutional authority to enact § 214(d).³²

In reversing the D.C. Circuit’s decision, the Supreme Court first noted that the lower court misunderstood the issue: “Zivotofsky does not ask the courts to determine whether

²⁷ *Id.* 1425–26.

²⁸ *Id.* at 1426.

²⁹ *Id.* (2012) (citing Zivotofsky *ex rel.* Ari Z. v. Sec’y of State, 444 F.3d 614, 619–20 (D.C. Cir. 2006)).

³⁰ Zivotofsky I, 132 S. Ct. at 1426 (quoting Zivotofsky *ex rel.* Zivotofsky v. Sec’y of State, 511 F. Supp. 2d 97, 103 (D.D.C. 2007)).

³¹ 132 S. Ct. at 1426.

³² Zivotofsky v. Sec’y of State, 571 F.3d 1227, 1234 (D.C. Cir. 2009) *vacated and remanded sub nom.* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421 (U.S. 2012). Judge Edwards explained that the issue was whether “Congress impermissibly intruded on the President’s exclusive power to recognize foreign sovereigns” and that this determination involves “commonplace issues of statutory and constitutional interpretation” which are “plainly matters for the court to decide.” *Id.* at 1234–35. Judge Edwards determined that the issue gives the court “no occasion” to decide a political question. *Id.* at 1235. In reaching the merits, Judge Edwards concluded that the President’s passport policy regarding Jerusalem is an exercise of the President’s plenary recognition power and found § 214(d) an unconstitutional violation of separation of powers. *Id.* at 1241.

Jerusalem is the capital of Israel. He instead seeks to determine whether he may vindicate his statutory right, under § 214(d), to choose to have Israel recorded on his passport as his place of birth.”³³ The Court reframed the issue as merely determining whether the statute is constitutional, or whether it impermissibly intrudes on the President’s constitutional powers.³⁴ The Court cited *Marbury v. Madison*, emphasizing that when a congressional act allegedly conflicts with the Constitution, “[i]t is emphatically the province and duty of the judicial department to say what the law is. That duty will sometimes involve the resolution of litigation challenging the constitutional authority of one of the three branches, but courts cannot avoid their responsibility merely because the issues have political implications.”³⁵ Although the Court went on to address the parties’ arguments, it ultimately concluded that the case should be remanded because the lower courts never reached the merits of the case.³⁶

As a result, the D.C. Circuit must determine the question on its merits. The court will need to examine the relationship between the President and Congress in the foreign policy arena as it pertains to the recognition of foreign sovereigns.³⁷ This case presents an issue of first impression because courts have not had occasion to determine the constitutionality of a statute that attempts to override the President’s recognition decision.³⁸

III. From Passports to Recognition

A. Passport Power

³³ 132 S. Ct. at 1427.

³⁴ *Id.*

³⁵ *Id.* (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)) (internal quotations omitted).

³⁶ *Zivotofsky I*, 132 S. Ct. at 1430.

³⁷ U.S. CONST. ART II, § 3.

³⁸ Brief for the Appellee, *supra* note 4, at 25; Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. RICH. L. REV. 801, 806 (2011).

Congress derives its legislative power over passports and birth registrations from Article I of the Constitution, which grants authority over immigration and foreign commerce.³⁹ Despite this authority, Congress traditionally endorsed executive authority with regard to passports.⁴⁰ It first delegated power over passports to the executive through the Passport Act of 1856, providing that the “Secretary of State shall be authorized to grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States.”⁴¹ According to the Court, “[t]he Act was passed to centralize passport authority in the Federal Government and specifically in the Secretary of State.”⁴² This is not to say that Congress cannot revoke or modify this delegation of power.⁴³ Congress cannot, however, use its authority to trench upon an independent executive power.⁴⁴ This necessarily raises the question of whether the President has inherent constitutional authority to regulate the place of birth designation on passports and consular reports of birth.

B. Standard for Evaluating Presidential Authority: Justice Jackson’s Tripartite Scheme

³⁹ U.S. CONST. ART. I, § 8 (“The Congress shall have Power To . . . regulate commerce with foreign Nations . . . establish a Uniform Rule of Naturalization . . .”); *see* *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824) (Marshal, C.J.) (“The right of Congress over navigation, and the transportation of both men and their goods, [is] not only incidental to, but actually of the essence of, the power to regulate commerce.”); *see also* *Haig v. Agee*, 453 U.S. 280, 293 (1981) (“As a travel control document, a passport is both proof of identity and proof of allegiance to the United States. Even under a travel control statute, however, a passport remains in a sense a document by which the Government vouches for the bearer and for his conduct.”).

⁴⁰ *Haig*, 453 U.S. at 293.

⁴¹ *Id.* at 294.

⁴² *Id.*

⁴³ *See* *Immigration and Naturalization Serv. (INS) v. Chadha*, 462 U.S. 926, 953 n. 16 (1983) (“Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.”); *see also* *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“[A]n administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”).

⁴⁴ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 37–38 (2d ed. 1996) (“Limitations on Congressional power are implied in grants of power to the President . . .”).

The scope of inherent presidential authority is addressed in *Youngstown Sheet & Tube Co. v. Sawyer*.⁴⁵ Justice Jackson, in a concurring opinion, delineated three zones of presidential authority.⁴⁶ First, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”⁴⁷ In these circumstances, the President’s acts are presumptively valid.⁴⁸ Next, “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”⁴⁹ This zone involves situations in which Congress and the President may have concurrent authority, or in which its distribution is uncertain.⁵⁰ Finally, “[w]hen the President *takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.*”⁵¹ In these situations, where the President is disobeying federal law, as is the case in *Zivotofsky*, he can rely only on his own constitutional powers and his actions are legitimate only if the law enacted by Congress is unconstitutional.⁵²

C. Recognition Power

In *Zivotofsky*, the Secretary of State continually relied on the executive’s “plenary” recognition power to argue that § 214(d) is unconstitutional. There has been debate, however, over whether the recognition power is meant to be exercised as a substantive and plenary presidential power or whether it is understood to merely be a duty to “receive” diplomats,

⁴⁵ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁴⁶ *Id.* at 635-9 (Jackson, J., concurring). Justice Jackson’s concurrence was later adopted into law in *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

⁴⁷ *Youngstown*, 343 U.S. at 635.

⁴⁸ *Id.*

⁴⁹ *Id.* at 637.

⁵⁰ *Dames & Moore v. Regan*, 453 U.S. at 668—69 (citing *Youngstown*, 343 U.S. at 635–39).

⁵¹ *Youngstown*, 343 U.S. at 637 (emphasis added).

⁵² ERWIN CHEREMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 341 (3rd ed. 2006) (citing *Youngstown*, 343 U.S. at 637).

leaving a recognition “power” held concurrently with Congress.⁵³ Although cases discussing the recognition clause refer to it as plenary, no court ever addressed a conflict between a congressional statute and presidential exercise of the recognition power.⁵⁴ The implications of concluding that the recognition power is plenary are substantial.

First, and foremost in this case, § 214(d) will inevitably be struck down as unconstitutional if the court also finds that recording “Israel” as place of birth is the equivalent of recognizing Israel’s sovereignty over the disputed capital. In the broader context, given the current state of world politics, where governments are overthrown with more and more regularity, finding that the recognition power is plenary means that the President will have final and untouchable authority each time a new regime is created, regardless of past treaties or relations.⁵⁵ To determine whether the Constitution granted the President this type of final authority, the D.C. Circuit must examine both the original understanding of the recognition clause as well as the evolution of the doctrine throughout United States’s history.

On its face, the Constitution does not describe the authority to receive ambassadors as a ‘power’ at all.⁵⁶ Rather than being included within the clause describing presidential powers, it is in the subsequent section and “seems a function, an assigned duty, a ceremony that in many countries is performed by a figurehead.”⁵⁷ Further, whereas § 2 of Article II grants the President

⁵³ Restatement (Third) of Foreign Relations Law § 204 (1987); David Gray Adler, *The President’s Recognition Power*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 133, 141 (Univ. of Kansas Press 1996); Brief for Petitioner at 35, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (No. 10-699) 2011 WL 328837.

⁵⁴ Reinstein, *supra* note 38, at 806. Further, judicial statements referring to the recognition as a plenary executive power are found in dicta. *Id.*

⁵⁵ *Unrest in the Middle East and North Africa: Hearing Before the Committee on Homeland Security*, 112th Cong. 3 (2011) (“Over the last few months, we have witnessed an unprecedented wave of unrest and revolutionary fervor—furor in North Africa and the Middle East, including among some of our long-time allies In the blink of an eye, the regimes in Tunisia and Egypt have been toppled, and protest movements have erupted in Jordan, Bahrain, Syria, and others. . . .”).

⁵⁶ HENKIN, *supra* note 44, at 37–8; ADLER, *supra* note 53, at 41. Reinstein, *supra* note 38, at 813.

⁵⁷ See U.S. CONST. ART. II, § 2; HENKIN, *supra* note 44, at 37–8. In its third clause, the Constitution states that the President “shall appoint” ambassadors, public ministers, and consuls. *Id.* Although not characterized as powers,

authority to make treaties and appoint ambassadors with the consent of the Senate, § 3 places no such limitations on the receipt of ambassadors.⁵⁸ If this clause actually grants substantial plenary power to the Executive, “it would be a remarkable singularity in the Constitution—giving a unilateral royal prerogative to the President.”⁵⁹ In view of the Framers’ aversion to monarchy and fear of executive prerogative, granting the President unilateral recognition authority would, as discussed below, fly in the face of the system of checks and balances intended by the Framers and “would have been contrary to [] the constitutional design for collective decisionmaking.”⁶⁰ Given the Constitution’s restrictive language, it seems unlikely that receipt of ambassadors was meant as a final and unchallengeable executive authority.

Early commentary on the recognition clause also indicates the Framers’ meant for receipt of ambassadors to be a mere functionary duty. In the first post-Constitutional convention commentary on the reception clause, Alexander Hamilton wrote:

to receive ambassadors and other public ministers ... is more a matter of dignity than authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner, than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor.⁶¹

James Madison wrote that the executive’s receipt of ambassadors “involve[s] no cognizance of the question, whether those exercising the government have the right along with the possession” and “[t]he questions before the executive are merely question of fact; and the executive would have precisely the same right, or rather be under the same necessity of deciding them, if its

these appear in the section that lists various Executive powers. *Id.* In contrast, receipt of foreign ambassadors is in the subsequent section, which does not mention ‘powers’ but merely lists things the President “shall” or “may” do. *Id.*

⁵⁸ Adler, *supra* note 53.

⁵⁹ Reinstein, *supra* note 38, at 815.

⁶⁰ Adler, *supra* note 53., at 147.

⁶¹ *Id.* at 140 (quoting *The Federalist No. 69* (Alexander Hamilton)).

function was simply to receive *without any discretion to reject* public ministers.”⁶² Moreover, Madison argued, “little if anything more was intended by the clause, than to provide for a particular mode of communication...by pointing out the department of the government most proper for the ceremony of admitting public ministers....”⁶³ According to the Framers’ original understanding of the Constitution, it seems that little consequence was attached to the President’s dignitary recognition authority.

The idea of a substantive recognition power did not arise until several years after the Constitution was enacted, during the French Revolution.⁶⁴ In *Pacificus*, Hamilton stated,

[t]he right of the executive to receive ambassadors and other public ministers...includes that of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognized, or not; which, where a treaty antecedently exists between the United States and such nation, involves the power of continuing or suspending its operation...This power of determining virtually upon the operation of national treaties, as a consequence of the power to receive public ministers, is an important instance of the right of the executive, to decide upon the obligations of the country with regard to foreign nations.⁶⁵

It can be argued that Hamilton’s about-face can be seen as an evolution in his, and the nation’s, understanding of the recognition clause as a result of the French Revolution. On the other hand, Hamilton’s drastic change could merely have been an attempt to re-characterize the reception clause as a result of political concerns at the time.⁶⁶ In 1793, Hamilton’s highest prerogative was preventing the United States from being pulled into the French wars as a result of a pre-existing

⁶² *Id.* at 146 (quoting Richard Loss, ed., *The Letters of Pacificus and Helvidius* 76 (Scholars’ Facsimiles and Reprints 1976)).

⁶³ *Id.* (quoting Richard Loss, ed., *The Letters of Pacificus and Helvidius* 76 (Scholars’ Facsimiles and Reprints 1976)).

⁶⁴ Adler, *supra* note 53., at 141.

⁶⁵ ALEXANDER HAMILTON AND JAMES MADISON, *LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793* 12–13 (J. and G.S. Gideon 1845).

⁶⁶ Adler, *supra* note 53., at 144.

alliance with France.⁶⁷ To do so, Hamilton connected the determination to recognize a foreign government to the suspension of pre-existing treaties.⁶⁸

As is the case with Hamilton's about-face, political concerns become a common thread in analysis of the recognition clause. This is not to say, however, that political concerns change the meaning of the Constitution as it was originally conceived. As originally conceived, both facially and in the Framers' commentary, the receipt of ambassadors was not meant to be a power at all.⁶⁹ In finding that the recognition clause merely conveys dignitary authority, one must thereby conclude that, at best, there is uncertainty as to which body possesses the power to recognize foreign sovereigns. One can argue that that the executive's refusal to recognize "Israel" as sovereign over Jerusalem is instead presumptively valid under the first part of the tripartite scheme, as it was acting pursuant to an express congressional authorization in the Passport Act of 1856.⁷⁰ On the other hand, § 214(d) is arguably a revocation of the Passport Act's delegation of power, placing the executive's refusal to comply in Justice Jackson's third category.⁷¹ In this case, the President cannot rely on his own constitutional "power" to refuse issuance of Zivotofsky's requested passport.⁷²

Despite the Framers' intent, the recognition clause has come to be understood as conferring a power on the President. Constitutional intent only goes so far "[b]ecause a foundational principle of the law is that to some degree what the law is on the books is

⁶⁷ *Id.* at 143.

⁶⁸ *Id.* at 144–46.

⁶⁹ Adler, *supra* note 53.

⁷⁰ *Haig*, 453 U.S. at 293

⁷¹ CHEMERINSKY, *supra* note 51.

⁷² *Id.*

determined by what is in practice.”⁷³ In the case of the recognition clause, shifting practices have caused more confusion than clarity.

Relations between the executive and Congress implicating the recognition power traditionally focused more on politics than on understanding constitutional intent. In the early nineteenth century, the United States considered recognition of the independence of certain South American provinces from Spain.⁷⁴ When first considering the question of recognition, President Monroe prepared a memorandum asking several questions:

Has the executive power to acknowledge the independence of new States...?
Will the sending or receiving a minister to a new State under such circumstances be considered an acknowledgment of its independence?
Is it expedient for the U. States at this time to acknowledge the independence of Buenos Ayres...?⁷⁵

These questions indicate President Monroe’s uncertainty over whether recognition was “really within the competence of the executive.”⁷⁶ Legislative actions that followed displayed a strong congressional opposition to executive power over recognition.⁷⁷ In 1817, Speaker of the House Henry Clay announced his intention to move for recognition of Buenos Aires in Congress and subsequently introduced a bill appropriating \$18,000 for the salary of a minister to be sent to the de la Plata provinces.⁷⁸ Opponents defeated the bill for “interfering with the functions of the executive....and [the executive] received a direct confirmation of its ultimate right to determine whether a government was to be recognized or not.”⁷⁹ Clay renewed his resolution in 1820, when sentiment in the country was overwhelmingly in favor of recognition, and the bill passed

⁷³ STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 4* (2008).

⁷⁴ JULIUS GOEBEL, *THE RECOGNITION POLICY OF THE UNITED STATES* 119 (1915).

⁷⁵ *Id.* at 120.

⁷⁶ *Id.* at 121.

⁷⁷ *Id.*

⁷⁸ *Id.* at 123 (citing 32 *Annals of Cong.* 1468–69 (1818)).

⁷⁹ *Id.* at 124; *see also* 32 *Annals of Cong.* 1570 (1818) (statement of Rep. A. Smyth) (“[T]he acknowledgment of the independence of a new Power is an exercise of Executive authority’ consequently, for Congress to direct the Executive how he shall exercise this power, is an act of usurpation.”).

by a narrow vote; however, it was never implemented.⁸⁰ In 1821, Clay again took up the fight for a resolution recognizing the South American provinces, but this time emphasized the interest that United States citizens had in South America's success and changed the bill to a non-binding motion supporting the President in recognizing sovereignty "whenever he may deem it expedient."⁸¹ This time, the bill passed by a large majority.⁸² It was not until the following year, however, that President Monroe finally recognized the South American provinces.⁸³

In contrast, in 1836, President Jackson acquiesced to a congressional resolution calling for the recognition of the Republic of Texas following its revolution against Mexico.⁸⁴ President Jackson observed that the question of which body of government possessed the recognition power was unresolved:

Nor has any deliberate inquiry ever been instituted in Congress, or in any of our legislative bodies, as to whom belonged the power of originally recognising a new state – a power, the exercise of which is equivalent, under some circumstances, to a declaration of war – a power nowhere expressly delegated, and only granted in the constitution, as it necessarily involved in some of the great powers given to Congress; in that given to the President and Senate to form treaties with foreign powers, and to appoint ambassadors and other public ministers; and in that conferred upon the President to receive ministers from foreign nations.⁸⁵

Notably, the President concurred with Congress's resolution on the ground of expediency because of the possibility of war, and as a result chose not to "express any opinion as to the strict constitutional right of the Executive, either apart from, or in conjunction with, the Senate over the subject."⁸⁶ He did so under the idea that, when recognition could lead to war, the decision

⁸⁰ GOEBEL, *supra* note 74, at 131–32.

⁸¹ *Id.* at 133.

⁸² *Id.* at 133–34.

⁸³ *Id.* at 135.

⁸⁴ Message from the President of the United States Upon the Subject of the Political, Military and Civil Condition of Texas, H.R. Doc. No. 24–35, at 1 (2d Sess.) (December 22, 1836).

⁸⁵ *Id.* at 2.

⁸⁶ *Id.*

should be left to the body that can declare war.⁸⁷ Additionally, President Jackson presumed that no future dispute would arise between the Executive and Congress on the question of the recognition power.⁸⁸

In 1896, the Senate Committee on Foreign Relations put forth a joint resolution acknowledging the independence of the Republic of Cuba.⁸⁹ The Secretary of State responded in a public statement:

The Power to recognize the so-called Republic of Cuba as an independent State rests exclusively with the Executive. A resolution on the subject by the Senate or by the House...is inoperative as legislation, and is important only as advice of great weight, voluntarily tendered to the Executive, regarding the manner in which he shall exercise his Constitutional functions.⁹⁰

When Congress again proposed recognizing Cuban independence and considered intervening in the Cuban revolution, President McKinley objected, stating,

Such recognition is not necessary in order to enable the United States to intervene and pacify the island. To commit this country now to the recognition of any particular government in Cuba might subject us to embarrassing conditions of international obligation toward the organization to be recognized.⁹¹

As a result, Congress dropped the language of recognition from the resolution, and instead expressed its view that the people of Cuba had the right to be “free and independent.”⁹²

Similarly, in 1919, the Senate considered withdrawing recognition of Mexico. President Wilson responded in a letter stating that the resolution would “constitute a reversal of our constitutional practice which might lead to very grave confusion in regard to the guidance of our

⁸⁷ GOEBEL, *supra* note 74, at 158.

⁸⁸ Message from the President of the United States Upon the Subject of the Political, Military and Civil Condition of Texas, H.R. Doc. No. 24–35, at 2 (2d Sess.) (December 22, 1836).

⁸⁹ *Congress Powerless*, N.Y. TIMES, Dec. 19, 1986.

⁹⁰ *Id.*

⁹¹ *Neely v. Henkel*, 180 U.S. 109, 124–25 (1901).

⁹² *Id.* at 125. The statute originally read “That the people of the island of Cuba are, and of right ought to be, free and independent, *and that the government of the United States hereby recognizes the Republic of Cuba as the true and lawful government of the island.*” *Id.* (emphasis in original). The words in italics were dropped following the President McKinley’s statement. *Id.*

foreign affairs.”⁹³ Shortly thereafter, the Senate Foreign Relations Committee announced that the resolution was “dead.”⁹⁴

The earliest courts provided little clarity to the recognition clause, examining only whether the *judiciary* could recognize foreign governments, but not examining fully the role of the political branches.⁹⁵ The court in *Williams v. Suffolk Ins. Co.* decided a case in which the American government had not recognized Buenos Aires’s claim of sovereignty over the Falkland Islands.⁹⁶ Justice Story, sitting as a Circuit Justice, wrote, “[i]t is very clear, that it *belongs exclusively to the executive department of our government to recognise*, from time to time, any new governments, which may arise in the political revolutions of the world. . . .”⁹⁷ Justice Story shed some light on the judiciary’s understanding of the recognition clause in his 1833 *Commentaries on the Constitution of the United States*.⁹⁸ First, Justice Story explained why an action that at first seems to be merely a dignitary duty became a substantial power. He reasoned it is “obvious” that “simple acknowledgment of the minister of either party” might be deemed taking a side in a conflict over sovereignty and is therefore “an executive function of great delicacy.”⁹⁹ As a result, receipt of an ambassador is the equivalent of de facto recognition of the sovereign authority of a new nation or a party in the civil war of an old nation.¹⁰⁰ Justice Story next noted that the recognition power might be concurrent. The executive’s recognition

⁹³ *Wilson Rebuffs Senate on Mexico*, N.Y. TIMES, Dec. 8, 1919, at 1.

⁹⁴ *Id.*

⁹⁵ See *United States v. Hutchings*, 26 F. Cas. 440, 442 (C.C.D. Va. 1817) (“[B]efore it could be considered independent by the judiciary of foreign nations, it was necessary that its independence should be recognized by the executive.”); *Williams v. Suffolk Ins Co*, 29 F. Cas. 1402, 1404 (C.C.D. Mass. 1838) (“[U]ntil such new governments are so recognised, they cannot be admitted by our courts of justice to have, or to exercise the common rights and prerogatives of sovereignty.”); *Luther v. Borden*, 48 U.S. 1, 44 (1849) (“[N]o court of the United States . . . would have been justified in recognizing the opposing party as the lawful government; or in treating as wrongdoers or insurgents the officers of the government which the President had recognized.”).

⁹⁶ *Williams*, 29 F. Cas. at 1403.

⁹⁷ *Id.* at 1404.

⁹⁸ See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1560 (Boston 1833).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

determination is conclusive unless Congress reverses it.¹⁰¹ Similarly, if the President has refused recognition, Congress can acknowledge sovereignty.¹⁰² Justice Story qualified these statements, however, by making clear that they are “still open to discussion” because “[t]he constitution has expressly invested the executive with power to receive ambassadors, and other ministers” but “[i]t has not expressly invested congress with the power, either to repudiate, or acknowledge them.”¹⁰³ The Constitution makes clear only that the judiciary can take no notice of a sovereign until it has ben “duly recognized by some other department of the government.”¹⁰⁴

Early courts examining the relationship between Congress and the President alluded to a shared recognition power. Only one year after *Hutchings*, the Court in *United States v. Palmer* stated,

when a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the Union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States.¹⁰⁵

Additionally, in *Oetjen v. Central Leather Co.*, where the Court considered recognition of two competing Mexican governments, it stated, “[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative-‘the political’- departments of the government.”¹⁰⁶

On the other hand, leading Supreme Court cases addressing the recognition power deferred to executive authority over recognition. The Court in *Guaranty Trust Co. of New York v. United States* accepted as “conclusive” a determination by the State Department on the

¹⁰¹ *Id.* (citing WILLIAM RAWLE, VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 195–6 (2d ed. 1829)).

¹⁰² *Id.*

¹⁰³ STORY, *supra* note 98.

¹⁰⁴ *Id.*

¹⁰⁵ 16 U.S. 610, 643 (1818) (emphasis added).

¹⁰⁶ 246 U.S. 297, 302 (1918) (emphasis added).

recognition of the Soviet Government.¹⁰⁷ Similarly, in *United States v. Belmont*, the Court stated that the “Executive had authority to speak as the sole organ of [] government” in recognizing the Russian government.¹⁰⁸ Furthermore, the Court noted that, as distinguishable from the treaty-making power, the President did not require the consent of Senate in doing so.¹⁰⁹ More recently, in *National City Bank v. Republic of China*, the Supreme Court determined that “[t]he status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court.”¹¹⁰ Most notably in this case, the D.C. Circuit acknowledged the Supreme Court’s recognition of the “President’s plenary power to recognize foreign sovereigns.”¹¹¹ Other circuits have also acknowledged the executive’s plenary power over recognition.¹¹²

¹⁰⁷ *Guar. Trust Co. of New York v. United States*, 304 U.S. 126, 138 (1938). Note, however, this case also involved a question of executive versus judicial recognition. *Id.* Congress never weighed in on the matter and the Court, notably stated that recognition is to be determined by the “political department” of government. *Id.* at 137–38 (“What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government. Objections to its determination as well as to the underlying policy are to be addressed to it and not to the courts.”).

¹⁰⁸ *United States v. Belmont*, 301 U.S. 324, 330 (1937); *see also* *United States v. Pink*, 315 U.S. 203, 229–30 (1942) (“[F]ull recognition...certainly is a modest implied power of the President who is the sole organ of the federal government in the field of international relations...Effectiveness in handling the delicate problems of foreign relations requires no less. Unless such a power exists, the power of recognition might be thwarted or seriously diluted... We would usurp the executive function if we held that that decision was not final and conclusive in the courts.”) (internal citations and quotations omitted).

¹⁰⁹ *Belmont*, 301 U.S. at 330.

¹¹⁰ *Nat’l City Bank v. Republic of China*, 348 U.S. 356, 358 (1955); *see also* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) (“Political recognition is exclusively a function of the executive.”).

¹¹¹ *Am. Int’l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 438 (D.C. Cir. 1981) (citing *United States v. Pink*, 315 U.S. 203, 229–(1942)).

¹¹² *Nat’l Union Fire Ins. Co. of Pittsburgh v. Republic of China*, 254 F.2d 177, 186 (4th Cir. 1958) (“In the United States and in Great Britain it is established that the courts of the country must accept the action of the executive branch of their nation in recognizing the existence and authority of the government of a foreign state; and this action is binding upon the courts...”); *Republic of Vietnam v. Pfizer, Inc.*, 556 F.2d 892, 894 (8th Cir. 1977) (“The recognition of foreign governments is a function of the executive branch and is wholly outside the competence of the judiciary.”); *KMW Int’l v. Chase Manhattan Bank, N.A.*, 606 F.2d 10, 17 (2d Cir. 1979) (“Recognition is a matter as to which the courts are bound by the Executive Branch’s determination.”); *Can v. United States*, 14 F.3d 160, 163 (2d Cir. 1994) (quoting *Nat’l City Bank*, 348 U.S. at 358 (1955) (“It is firmly established that official recognition of a foreign sovereign is solely for the President to determine, and ‘is outside the competence’ of courts.”); *Mingtai Fire & Marine Ins. Co., Ltd. v. United Parcel Serv.*, 177 F.3d 1142, 1145 (9th Cir. 1999) (“[T]he Supreme Court has repeatedly held that the Constitution commits to the Executive Branch alone the authority to recognize, and to withdraw recognition from, foreign regimes.”).

Although early sources were mixed, the Supreme Court’s experience over the last century indicates the judiciary currently leans toward reading the recognition clause as both a plenary and substantive executive power. Further, despite the mixed evidence, many scholars seem to accept that the recognition power extends to determining which foreign governments the United States should recognize or refuse to recognize.¹¹³ Some cite practical considerations to evince a need for plenary executive recognition power—“[a] concurrent authority in two independent departments to perform the same function with respect to the same thing, would be as awkward in practice, as it is unnatural in theory.”¹¹⁴ This necessarily places the case in Justice Jackson’s third category of presidential authority.¹¹⁵ If courts recognize the recognition clause as plenary, § 214(d) must be unconstitutional if it intrudes on the President’s exercise of that power.

IV. Is § 214(d) An Encroachment on the Executive’s Plenary Recognition Power?

If the court adopts the plenary reading of the recognition clause, § 214(d) is unconstitutional if it conflicts with the executive’s policy of not recognizing Israeli sovereignty over Jerusalem.¹¹⁶ The question then becomes whether, by asking the Secretary of State, upon request, to list “Israel” as the place of birth of an American citizen born in Jerusalem, Congress “recognized” Israeli sovereignty of Jerusalem. This involves interpretation of § 214(d)’s purpose and effect.

¹¹³ HENKIN, *supra* note 44, at 43 (2d ed. 1996); Restatement (Third) of Foreign Relations Law § 204 (1987) (“Under the Constitution of the United States, the President has exclusive authority to recognize or not to recognize a foreign state or government, and to maintain or not to maintain diplomatic relations with a foreign government.”),

¹¹⁴ Mark D. Rosen, *From Exclusivity to Concurrence*, 94 Minn. L. Rev. 1051, 1053 (2010) (quoting James Madison, Helvidius Number II (1793), reprinted in Alexander Hamilton & James Madison, *The Pacificus-Helvidius Debates of 1793–1794: Toward the Completion of the American Founding* 68-69 (Morton J. Frisch ed., 2007)).

¹¹⁵ *Youngstown*, 343 U.S. at 635–39.

¹¹⁶ Brief for the Appellee, *supra* note 10.

According to Zivotofsky, § 214(d) does not implicate the recognition power at all; he “does not claim that the statutory provision in question represents an attempt by Congress to dictate United States policy regarding the status of Jerusalem.”¹¹⁷ Rather, Zivotofsky

contends in effect that Congress has the power to mandate that an American citizen born abroad be given the option of including in his passport and Consular Report of Birth Abroad (CRBA) what amounts to a statement of personal belief on the status of Jerusalem.¹¹⁸

On the one hand, § 214(d), by its terms, does not instruct the executive to alter its policy regarding Jerusalem’s status. Rather, in Zivotofsky’s view, § 214(d) can be construed as a narrow, ministerial, and non-mandatory act permitting citizens born in Jerusalem to self-identify.¹¹⁹

If the Act can be read as merely ministerial, the court is obligated to read the statute as such so as not to implicate the recognition issue. Ambiguity as to the purpose and effect of a statute must be resolved so as to avoid constitutional issues.¹²⁰ § 214(d) states:

RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES.—
*For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.*¹²¹

The statute begins by limiting designation of Jerusalem as place of birth simply “for the purposes of” passports and consular reports of birth. Furthermore, the Secretary need not list Israel in the passports of *all* citizens born in Jerusalem. Rather, the Secretary only does so “upon the request”

¹¹⁷ *Zivotofsky I*, 132 S. Ct. at 1436 (Alito, J. concurring in the judgment).

¹¹⁸ *Id.* at 1436.

¹¹⁹ *Id.*

¹²⁰ *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”).

¹²¹ FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 2003, PL 107–228, September 30, 2002, 116 Stat 1350 (emphasis added).

of American citizens born in Jerusalem. Because it is limited to this scope, § 214(d) need not be read as purporting the change the United State’s recognition policy.¹²²

On the other hand, read in context with the other sections of the statute, § 214(d)’s purpose seems to be an attempt to rework the policy of the United States with regard to Jerusalem. Section 214(b) limits appropriated funds to diplomatic facilities in Jerusalem under the supervision of the United States Ambassador to Israel.¹²³ Section 214(c) limits appropriated funds to government documents recognizing Jerusalem as the capital of Israel.¹²⁴ The title of the statute is an even more blatant exhibition of congressional intent, reading, “United States Policy with Respect to Jerusalem as the Capital of Israel.”¹²⁵ Read together, the purpose of the Act is clearly to work a change in American policy with regard to Jerusalem. Further, § 214(d) states, “[t]he Secretary *shall*, upon the request of the citizen...record the place of birth as Israel.”¹²⁶ The word “shall” is understood as “the language of a command.”¹²⁷ Although a statute must be interpreted so as to give effect and avoid constitutional issues, that general rule is not applicable

¹²² See *Shachtman v. Dulles*, 225 F.2d 938, 944 (D.C. Cir. 1955) (“We must not confuse the problem of appellant’s application for a passport with the conduct of foreign affairs in the political sense, which is entirely removed from judicial competence. For even though his application might be said to come within the scope of foreign affairs in a broad sense, it is also within the scope of the due process clause, which is concerned with the liberty of the individual free of arbitrary administrative restraint. There must be some reconciliation of these interests where only the right of a particular individual to travel is involved and not a question of foreign affairs on a political level.”); see also Brief of the Anti-Defamation League et al. as Amici Curiae Supporting Plaintiff-Appellant at 8, No. 07-5347 (D.C. Cir. July 26, 2012).

¹²³ FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 2003, PL 107–228, September 30, 2002, 116 Stat 1350 (“None of the funds authorized to be appropriated by this Act may be expended for the operation of a United States consulate or diplomatic facility in Jerusalem unless such consulate or diplomatic facility is under the supervision of the United States Ambassador to Israel.”)

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Zivotofsky v. Sec’y of State*, 571 F.3d at 1243 (Edwards, H. concurring) (quoting *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)); see also *Ass’n of Civilian Technicians, Montana Air Chapter No. 29 v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (“The word “shall” generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.”).

here because the statute, read as a whole, is unambiguous in its purpose.¹²⁸ Where a statute is unambiguous, constitutional avoidance is inappropriate.¹²⁹

Even if § 214(d) is an attempt to rework United States policy, it might be read as a “sense resolution.” Where Congress does not have the power to legislate on a particular issue, it may still assert its influence through the passage of a resolution “expressing the ‘sense’ of the Congress about some international matter, or calling on the President to do something.”¹³⁰ A sense resolution is particularly significant where it reflects public opinion, as was seen in Henry Clay’s 1821 non-binding bill urging the President to recognize the South American provinces as a result of American citizens’ public interest.¹³¹ Congress can assert its “sense” by refusing appropriations.¹³² In the past, Presidents have sometimes upheld these resolutions, but made clear to foreign governments that these non-legislative resolutions do not speak for the United States.¹³³

The Jerusalem Embassy Act of 1995 is an example of a “sense” resolution. The 1995 Act was passed with the purpose of initiating the relocation of the United States Embassy in Israel from Tel Aviv to Jerusalem.¹³⁴ It purported to set a deadline for the move, with the establishment of the embassy in Jerusalem to be completed by May 31, 1999.¹³⁵ The 1995 Act

¹²⁸ *Edward J. DeBartolo Corp.*, 485 U.S. at 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”).

¹²⁹ *Zivotofsky v. Sec’y of State*, 571 F.3d at 1245 (Edwards, H. concurring); *see also* *Clark v. Martinez*, 543 U.S. 371, 385 (2005) (“The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.”); *United States v. Albertini*, 472 U.S. 675, 680 (1985) (“Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.”).

¹³⁰ HENKIN, *supra* note 44, at 81.

¹³¹ *Id.*; *see* GOEBEL, *supra* note 74 and accompanying text.

¹³² HENKIN, *supra* note 44, at 81.

¹³³ *Id.* For example, Secretary Dulles disowned an address by Senator John F. Kennedy promoting Algerian independence; Secretary of State Seward disowned a House Resolution attaching France’s activities in Mexico during the American Civil War. *Id.*

¹³⁴ JERUSALEM EMBASSY ACT OF 1995, PL 104–45, November 8, 1995, 109 Stat 398.

¹³⁵ *Id.*

also authorized the appropriation of funds for the purpose of establishing an embassy in Jerusalem.¹³⁶ There is a critical distinction, however, between § 214 and the Jerusalem Embassy Act. While the 1995 Act gives the President a waiver allowing him to suspend the enactment for six months at a time if he determines it is necessary to protect national security interests, § 214(d) contains no waiver.¹³⁷ As such, § 214(d) intrudes on the executive’s recognition power because its purpose clearly attempts to rework United States policy with regard to Jerusalem.

Section 214(d) might, however, be sustained by learning from the experience of a similar statute. In 1994, Congress passed the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995.¹³⁸ Section 132 of the act, entitled “Record of Place of Birth For Taiwanese-Americans,” states, “For purposes of the registration of birth or certification of nationality of a United States citizen born in Taiwan, the Secretary of State shall permit the place of birth to be recorded as Taiwan.”¹³⁹ Although the United States recognized the People’s Republic of China as official sovereign over Taiwan, the Department of State nonetheless adopted the statute without issue.¹⁴⁰ Prior to the enactment of the statute, China had objected so strenuously to designating “Taiwan” as place of birth on American passports that it refused to endorse visas on American passports listing “Taiwan” as the holder’s place of birth.¹⁴¹ In enacting the law, the Department of State merely issued a bulletin noting,

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEARS 1994 AND 1995, PL 103–236, April 30, 1994, 108 Stat 382.

¹³⁹ *Id.*; *c.f.* § 214(d), stating “For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.” FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 2003, Pub. L. No. 107–228, Sept. 30, 2002, 116 Stat 1350, 1365–66.

¹⁴⁰ Declaration of Alyza D. Lewin at Exh. 6, *Zivotofsky v. Secretary of State*, No. 03-1921 (D.C. Cir. Oct. 3, 2006), ECF No. 41-3.

¹⁴¹ Brief for Petitioner at 51, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (No. 10-699) 2011 WL 328837.

although issuing offices may now enter ‘Taiwan’...the United States does not officially recognize Taiwan as a state....The United States recognizes the government of the People’s Republic of China as the sole legal government of China and acknowledges the Chinese position that there is but one China and that Taiwan is a part of China.¹⁴²

The current Foreign Affairs Manual utilized by the Department of State contains a similar statement clarifying United States policy with regard to the recognition of Taiwan.¹⁴³

Zivotofsky argues that, because there is no meaningful difference between the Taiwan statute and § 214(d), the same should hold true for American citizens requesting that Israel be recorded as their place of birth.¹⁴⁴ The Secretary responds by emphasizing that

[t]he State Department began listing Taiwan only after determining that doing so would be consistent with the United States’ recognition that the People’s Republic of China is the ‘sole legal government of China’ and acknowledgement of the Chinese position that ‘Taiwan is a part of China....As is demonstrated by the care taken in addressing the Taiwan question and by the detailed regulations regarding place names throughout the world, a determination as to whether use of a place name is consistent with United States’ policy involves quintessential foreign-policy judgments based on the respective facts of each situation.¹⁴⁵

According to the Secretary, the care taken with the Taiwan situation exhibited its determination that listing Taiwan did not contravene American policy. The Secretary, however, offers no explanation regarding how this assessment was made but only gives a blanket statement that the statute did not contravene with its recognition policy toward Taiwan.¹⁴⁶ Judge Edwards, in his concurring opinion for the D.C. Circuit, agreed with this position, stating that because recording

¹⁴² Declaration of Alyza D. Lewin at Exh. 6, *supra* note 140. Additionally, the instruction states, “Passports may not be issued showing place of birth as ‘Taiwan, China’, ‘Taiwan, Republic of China’ or ‘Taiwan ROC.’” *Id.*

¹⁴³ See 6 Immigration Law Service 2d PSD Foreign Affairs Manual 1300 APP D (“The United States does not officially recognize Taiwan as a “state” or “country,” although passport issuing officers may enter ‘Taiwan’ as a place of birth.”).

¹⁴⁴ Brief for Petitioner at 52, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (No. 10-699) 2011 WL 328837.

¹⁴⁵ Brief for the Appellee, *supra* note 4, at 55.

¹⁴⁶ Declaration of Alyza D. Lewin at Exh. 6, *supra* note 140; See 6 Immigration Law Service 2d PSD Foreign Affairs Manual 1300 APP D).

‘Taiwan’ did not contravene the Executive’s assessment, the statute was constitutional.¹⁴⁷ He contrasted Zivotofsky’s case because, here, the State Department “has determined that recording Israel...misstates the terms of this country’s recognition of Israel.”¹⁴⁸ Judge Edwards concluded that, because the President has plenary power to establish policies governing recognition, he can treat “different situations differently,” depending on his assessment of the situation.¹⁴⁹

The Secretary and Judge Edwards’s common position raises the issue of presidential accountability. Is it wise to allow the executive to issue abstract and unexplained decisions in foreign policy, unchecked by either of the other federal branches of government? The Secretary’s position seems to fly in the face of the system of checks and balances intended by the Framers. The “unitary executive” theory is informative in this analysis.

V. Unilateral Executive and the Recognition Power

The “unitary executive” theory is important to the § 214(d) analysis because it solves the questions left unanswered by the recognition clause. Specifically, because the historical analysis of the “receive ambassadors” clause is mixed, the D.C. Circuit will need to rely on prudential concerns in determining whether the President should have sole recognition authority. The unitary executive theory resolves the issue by asking whether the President must have *plenary* power to control execution of the laws.¹⁵⁰

Derived from the Vesting Clause of Article II, which provides that “the executive Power shall be vested in a President of the United States of America,” the unitary executive theory suggests that all federal administrative and executive powers belong to the President.¹⁵¹ Inherent

¹⁴⁷ *Zivotofsky v. Sec’y of State*, 571 F.3d at 1244 (Edwards, H. concurring).

¹⁴⁸ *Id.* at 1245.

¹⁴⁹ *Id.*

¹⁵⁰ Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 7 (1994).

¹⁵¹ U.S. CONST. ART II, § 1, CL. 1; STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3* (2008); Karl Manheim & Allan Ides, *The Unitary Executive*

in this theory is the conventional concept that the Constitution mandates a strict separation of powers between the federal branches of government and “efforts within one branch to influence or control the exercise of another branch’s powers are illegitimate and should be rejected...”¹⁵² The idea is particularly instructive in looking at Zone 3 Justice Jackson’s tripartite scheme.¹⁵³ The unitary executive theory attempts to resolve the problems that arise when the President defies Congress by simply “locating the widest possible array of powers in the executive branch.”¹⁵⁴ With regard to the recognition clause, the unitary executive theory provides the President the widest latitude, making the executive’s determination essentially untouchable.

The debate over the unitary executive theory revolves around how far the Framers’ meant the unitary executive idea to extend.¹⁵⁵ There are two basic versions of the unitary executive theory, a strong and a weak version.¹⁵⁶ The strong version argues that the President has plenary and unlimited power over the execution of administrative functions.¹⁵⁷ Presidentialist theorists point to the Vesting Clause to argue that executive power is measured by the powers associated to the British Monarchy in 1787, which is the measure of executive power understood by the Framers.¹⁵⁸ Any attempt to limit executive power, whether through congressional or judicial oversight on executive activities, is unconstitutional.¹⁵⁹ This version can be equated to the “presidentialist position” discussed by Peter M. Shane in reference to the President’s power in

Federal Courts Have Almost Always Rebuffed Assertions of Unchecked Power by the Executive Branch, L.A. LAW., Sept. 2006, at 24.

¹⁵² Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 468 (2011)

¹⁵³ *Youngstown*, 343 U.S. at 637.

¹⁵⁴ Manheim & Ides, *supra* note 150, at 26.

¹⁵⁵ Lessig & Sunstein, *supra* note 150, at 8 (“No one denies that in some sense the framers created a unitary executive; the question is in what sense); see also Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 599–600 (1984) (“While it was understood that there would be departments responsible for daily administration, the Convention clearly and consciously chose a single and independent executive over a collegial body subject to legislative direction.”).

¹⁵⁶ Lessig & Sunstein, *supra* note 150, at 8.

¹⁵⁷ *Id.*

¹⁵⁸ PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 43 (2009).

¹⁵⁹ Manheim & Ides, *supra* note 150, at 24.

foreign and military affairs.¹⁶⁰ According to Shane, the presidentialist position allows the President to do almost anything in foreign affairs, subject only to the qualifications specifically spelled out in the Constitution.¹⁶¹

The strong version seems to be the one advocated by the Secretary in this case, and by many executives in recent history.¹⁶² Under this view of the unilateral executive, the Secretary's position that the executive may issue blanket decisions with regard to recognition is fully warranted.¹⁶³ This puts § 214(d) in a precarious position. The executive can make a bare assertion that one situation is simply different from another, as with Taiwan and Jerusalem. Any position taken in favor of this approach makes the President's decision untouchable by Congress or the judiciary.

The alternative to this position, at the opposite end of the spectrum, is the weak version of the unilateral executive theory.¹⁶⁴ Proponents of the weak version argue that the Vesting Clause should be interpreted to give the executive no power beyond those powers specifically articulated in Article II of the Constitution.¹⁶⁵ Under this view, also referred to as "congressional supremacy," Congress has wide latitude to structure nonexecutive functions, such as policymaking, exercised by the executive.¹⁶⁶ As a result, the President has no powers in foreign

¹⁶⁰ SHANE, *supra* note 150, at 43.

¹⁶¹ *Id.*

¹⁶² See Manheim & Ides, *supra* note 150, at 26–27 ("The theory of the unitary executive was initially crafted by Reagan administration officials as a justification for their efforts to establish 'a highly centralized bureaucratic structure of government that would ensure that ultimate control of decision making in all Executive Branch agencies... would rest in the hands of the President or his delegate.'"); see also Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 628–29 (1989).

¹⁶³ Declaration of Alyza D. Lewin at Exh. 6, see *supra* note 140 and accompanying text. *Zivotofsky v. Sec'y of State*, 571 F.3d at 1244 (Edwards, H. concurring).

¹⁶⁴ See Lessig & Sunstein, *supra* note 150, at 9; see also SHANE, *supra* note 150, at 43.

¹⁶⁵ SHANE, *supra* note 150, at 43.

¹⁶⁶ Lessig & Sunstein, *supra* note 150; SHANE, *supra* note 150, at 43.

affairs other than those explicitly assigned in Article II or authorized by Congress in legislation except in emergencies precluding congressional action.¹⁶⁷

The problem with both of these versions is that neither “square[s] neatly” with the Constitution’s text or history.¹⁶⁸ First, as to the presidentialist view, much of Article II would be redundant if the Vesting Clause were meant to give the President all monarchical authorities except the stated limitations.¹⁶⁹ Specifically, in this case, the receive ambassadors clause becomes superfluous because monarchical executive powers already included it.¹⁷⁰ It is inconceivable that the Framers’ would have embraced an executive with full monarchic powers.¹⁷¹ Moreover, the practical ramifications of this idea are great. Under the strong unitary executive, the President’s powers over war and foreign affairs are plenary and exclusive, not subject to oversight by the other branches.¹⁷² The theory tells us, “aside from political accountability, presidential power must remain unrestrained by the niceties of the law.”¹⁷³

On the other hand, as to the congressional supremacy view, the Framers and early Congresses understood that the President’s foreign and military affairs powers extended beyond those articulated in the Constitution.¹⁷⁴ Further, adoption of a weak unitary executive theory is unworkable in practice. The recognition power implicates day-to-day relations with other nations and the United States “must be able to speak with one voice on such issues as *whose consent* is necessary before entering foreign territory, *who can bind a foreign country*

¹⁶⁷ SHANE, *supra* note 150, at 43.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 44.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Manheim & Ides, *supra* note 150, at 28.

¹⁷³ *Id.*

¹⁷⁴ SHANE, *supra* note 150, at 45–6 (2009) (“The Constitution does not spell out either of these powers; yet, there seems never to have been any doubt that the President of the United States would possess them.”).

internationally, what is the proper disposition of its assets in the United States, and *who can speak for the country* in United States courts.”¹⁷⁵

The solution is a middle ground between a strong and a weak executive in order to create better executive accountability while preserving the system of checks and balances envisioned by the Framers. A middle ground approach is the best solution because it recognizes that neither political branch can be neutral because “politics is at its core, in the sense that value judgments are pervasive,” making democratic controls on policymaking crucial.¹⁷⁶ Jack M. Beerman articulates why resolving separation of powers disputes by simply determining which branch properly holds that power is the best approach:

As the Framers made clear, the idea of separation of powers is not to assign a power to each branch and then give that branch a free hand in exercising that power. Rather, they understood that the whole idea of separation of powers is to condition government action on agreement among multiple centers of power. For this to work, each branch must have a way to check the others. If powers were clearly assigned to branches, checking might still occur through informal bargaining, but such checking is likely to be less robust than when more than one branch has a colorable claim of authority in a substantive area.¹⁷⁷

Although this creates greater competition for control, it is “the essence of separation of powers with checks and balances.”¹⁷⁸

A middle ground view of executive power means that, even if modern courts and scholars view the recognition power as both plenary and substantive, Congress should nevertheless be able to create informal checks on the President’s authority. This can be accomplished through the use of sense resolutions encouraging the President to take particular action or other bills refusing appropriations where the President’s recognition policy goes against popular opinion.¹⁷⁹

¹⁷⁵ Brief for the Appellee, *supra* note 4, at 44.

¹⁷⁶ Lessig & Sunstein, *supra* note 150, at 102 (1994); *see also* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

¹⁷⁷ Beerman, *supra* note 150, at 507.

¹⁷⁸ *Id.*

¹⁷⁹ *See supra* text accompanying notes 130–134.

Another way to check the President's recognition power is through the use of bills such as § 214(d) and § 132 of the 1994 Foreign Relations Authorization Act.¹⁸⁰

VI. Conclusion

American citizens born in Jerusalem are set apart from others as a result of the United States policy of not recognizing Jerusalem to be part of any nation. Although Congress attempted to change this with the passage of § 214(d), affording citizens the right to have "Israel" listed as their birthplace, the Department of State has refused to enforce the statute, claiming that it is unconstitutional. The political debate arising from this seemingly innocuous statute has endured for nearly a decade, touching on questions left unresolved in the Constitution since its inception.

The ultimate solution to resolving the debate over the recognition power lies in reinforcing a system of checks and balances. With regard to the problem in *Zivotofsky*, this solution calls for a greater check on the President's recognition power rather than simply finding § 214(d) unconstitutional at the President's bare assertion that the statute intrudes upon his recognition power. Allowing the difference in treatment between Taiwan and Jerusalem without explanation is unacceptable, putting the executive "above traditional constitutional checks and balances and essentially mak[ing] the president a *temporary monarch*."¹⁸¹ This has great implications for similar situations that arise in the future because any sitting President's bare assertion that his or her recognition decision is or is not appropriate in a given situation can upset the course of foreign relations tracked by Congress and previous presidents.

In this case, the effect of allowing American citizens born in Taiwan to list "Taiwan" as their birthplace cannot be distinguished from allowing citizens born in Jerusalem to list "Israel."

¹⁸⁰ See *supra* text accompanying notes 138–139.

¹⁸¹ Manheim & Ides, *supra* 150, at 27.

Although China objected strenuously to the Taiwan statute, there was no political backlash other than China's refusal to endorse visas on those passports.¹⁸² On the other hand, according to the Secretary of State, any act by the American government to prejudge the statute of Jerusalem could undercut the United States's legitimacy as a major political player in the Arab-Israeli peace process by

signal[ing], symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process.¹⁸³

To this effect, the Secretary argues, "Palestinians would view any United States change with respect to Jerusalem as an endorsement of Israel's claim to Jerusalem and a rejection of their own."¹⁸⁴ The experience of this litigation, however, shows otherwise. In the decade since *Zivotofsky* first appeared on a court docket, the issue has received no public attention in the Arab world. Nor has any Palestinian or Arab interest group submitted an *amicus curiae* brief contending that § 214(d) should be struck down.¹⁸⁵ It seems "the sky will not fall...if all or some of the approximately 50,000 American citizens born in Jerusalem carry passports that say 'Israel'."¹⁸⁶

Because this case is indistinguishable from the Taiwan statute, the D.C. Circuit should uphold § 214(d) as a check on the President's recognition power. As in the Taiwan case, the executive may issue a bulletin clarifying the United States' policy with regard to Jerusalem.¹⁸⁷ Allowing § 214(d) to stand accomplishes the goal of presidential accountability and fosters checks and balances by precluding the President from simply treating "different situations

¹⁸² Brief for Petitioner, *supra* note 141, at 51.

¹⁸³ Brief for the Appellee, *supra* note 4, at 4.

¹⁸⁴ Brief for Petitioner, *supra* note 141, at 51.

¹⁸⁵ Appellant's Reply Brief at 3, *Zivotofsky ex rel. Zivotofsky v. Clinton*, No. 07-5347 (D.C. Circ. Nov. 6 2012).

¹⁸⁶ *Id.*

¹⁸⁷ See *supra* text accompanying notes 142–43.

differently,” instead forcing him to produce real evidence showing that a particular policy impedes foreign policy objectives.