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Menachem Binyamin Zivotofsky v. John Kerry, Secretary of State
Brief of Respondent

Table of Cited Authorities:

Alaska Airlines, Inc. v. Brock (1987)
The Federalist Papers No. 10, No 47, No. 51, No. 69
Foreign Affairs Manual
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Roosevelt Corollary
S. Doc. No. 56, 54th Congress, 2d Sess. (1897), 20-22.
Section 214 of the Foreign Relations Authorization Act
Statement of Archibald Maclaine in the North Carolina Ratifying Convention (July 28, 1788)
St. George Tucker, Blackstone's Commentaries (1803)
Thomas Jefferson, Opinion on the Powers of the Senate Respecting Diplomatic Appointments
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Statement of Argument:
Based on historical evidences, the President of the United States possesses the power of recognition—the authority to acknowledge a state and its government as sovereign. Using this power, the Executive Branch of the United States has declined to recognize Jerusalem as a part of any country since 1948 to avoid any conflicts with foreign nations. The parents of the Jerusalem-born citizen Menachem Zivotofsky requested and were denied of listing the place of birth as Israel, and sued the Secretary of the State for noncompliance with the Foreign Relations Authorization Act passed in 2002. In the current case posed to the Supreme Court, the constitutionality of the Foreign Relations Authorization Act is questioned because of its infringement on the powers of the Executive Branch. Because the power of recognition was vested in the President, the Foreign Relations Authorization Act of 2002 is a violation of the Constitution and the principle of separation of powers.

Argument:
In political terms, recognition power is the official authority to acknowledge a foreign government and state as sovereign. In the United States government, the Executive Branch of United States *essentially* possesses the power of recognition as derived from the United States

Constitution, intentions of the Founding Fathers of the United States, the previous Supreme Court cases, and other historical evidences.

The Constitution, devised by the Framers, explicitly allocates the recognition power to the President of the United States by giving the President the power to receive and appoint ambassadors whereas the role of the Congress concerning recognition power is quite informal. The Constitution states that the President of the United States "shall receive Ambassadors …" (Article II, §3) and has the power "to make Treaties … and he shall nominate, and … shall appoint Ambassadors … with the Advice and Consent of the Senate" (Article II, §2). As ambassador is defined as "an accredited diplomat sent by its country as an official representative to a foreign country" (Oxford dictionary), the power to appoint and receive ambassadors as well as making treaties with another nation fundamentally gives the responsibility of the recognition power to the President; using ambassadors, the President can recognize or refuse to recognize a foreign state. Constitution does not grant the recognition power to the Legislative Branch of the United States, for only the Senate can informally attempt to influence the President through usage of advices or threat of non-approvals. Also, the powers granted constitutionally to the Legislative Branch do not concern the essential recognition power. Article I, §8 delegates certain powers to the Legislative Branch, and the clauses that may have to do with foreign relationship are 3, 5, 10, and 11. However, each of the powers listed only allows the Congress to manage the relationship with foreign countries and does not mention anything about essentially forming a relationship with foreign countries. The Constitution which organizes the structure of the government of the United States endows the essential power of recognition in the Chief Executive.

Many Founding Fathers expressed that the recognition power is and should be bestowed in the President. George Washington, the First President of the United States with the unanimous electoral votes, contributed in expressing that the Executive Branch has the essential recognition power. He encountered a tough decision to make when France formed its new republican government in 1793. As a Framer of the Constitution who surrounded himself with other Framers during his administration, Washington must have known the recognition power was intended for the President as he ultimately recognized the French Republic through his Secretary of State. George Washington in his Neutrality Proclamation of 1793 asserted that the United States will stay neutral between the Great Britain and the French Republic. Washington exercised his recognition power as he uses his constitutionally delegated power of sending and receiving (or not receiving) ambassadors to display the neutrality of the United States as he recognized both England and France to develop healthy foreign relationships. During the North Carolina Ratifying Convention, Archibald Maclaine said that the power to receive ambassadors and other public ministers could be "vested nowhere but in the executive, because he is perpetually acting for the public," and states afterwards that although the Senate is "to advise him in the appointment officers … the President must do this business, or else it will be neglected." As an influential supporter of the Constitution, Maclaine believed that the power to appoint ambassadors, thereby recognizing foreign countries, should only be given to the Executive Branch since the President is to represent the nation as a whole and should not be subject to legislative actions. Thomas Jefferson once stated, "The transaction of business with foreign nations is Executive altogether except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly" (Opinion on the Powers of the Senate

Respecting Diplomatic Appointments). Third President of the United States and a passionate Founding Father, Jefferson radiates the impression that the essential foreign matters is the responsibility of the Executive Branch of the United States only except where Senate ratifies as the Constitution mentions. Alexander Hamilton, an advocate of the Constitution, explains that the recognition power should be that of the President. Hamilton explains through *Federalist No. 69* that "The president is also to be authorized to receive ambassadors and other public ministers. This … is more a matter of dignity than authority." Hamilton sees the responsibility of foreign matters should be possessed by the President since he is an authority figure who represents the United States to other nations; it would appear foolish to foreign nations for the President not to have the power to manage foreign affairs when he/she is in a position of a leader of the nation. Hamilton further emphasizes this as reiterating the idea, "The general doctrine then of our constitution is, that the Executive Power of the Nation is vested in the President; subject only to the exceptions and qu[a]lifications …" (*Pacificus No. 1*). Another figure made a bold statement during his administration as the President—James Monroe. Within his administration, a Monroe Doctrine was passed; the Monroe Doctrine warned the European nations not to interfere with the affairs of the United States and threatened that United States will recognize foreign states not accepting the doctrine as being hostile. He asserted the power of foreign affairs of the President as he declared the doctrine, ultimately implying the recognition power of the President. These Founders set a traditional precedent regarding the recognition power as that of Executive Branch.

Many events throughout the history establish and follow the tradition that the President primarily holds the power of recognition in the United States. In the last years of Cuba's fight for independence, Congress urged the President to recognize Cuba as a country to help their cause. In 1897, the Senate Foreign Relations Committee investigated recognition power and came to the following conclusions: "The 'recognition' of independence or belligerency of a foreign power… is distinctly a diplomatic matter. It is properly evidenced either by sending a public minister to the Government thus recognized, or by receiving a public minister therefrom. The latter is the usual and proper course…The reception of this envoy, as pointed out, is the act of the President alone. The next step, that of sending a public minister to the nation thus recognized, is primarily the act of the President. The Senate can take no part in it at all, until the President has sent in a nomination…The legislative branch of the Government can exercise no influence over this step except, very indirectly, by withholding appropriations. . . . Nor can the legislative branch of the Government hold any communications with foreign nations." The committee decided that recognition power is the President's power, based on his status as Chief Diplomat. The committee goes on to emphasize that the legislative branch has no authority in recognizing countries except the Senate's power to confirm nominations. If Congress came to these conclusions, it should not pass a law that impermissibly infringes on the President's power of recognition. Soon after the recognition of the independence of Cuban Republic and the assassination of President William McKinley, President Theodore Roosevelt arose to the presidency and adopted the "Big Stick policy" as his foreign policy which made the United States "the policeman" of the Western Hemisphere. Although turning out to be unpopular, Roosevelt Corollary to the Monroe Doctrine was established after becoming aware of the increasing European interest of the potential economic gains from the Latin Americas. Using the similar ideas from the Monroe Doctrine, the Roosevelt Corollary emphasized limited intervention of European nations in the Western Hemisphere and asserted the policeman power of the United States regarding the Western Hemisphere. The Roosevelt Corollary is an exertion

of the recognition power of the President as it once again warns the European countries not to intervene in the affairs of the Western Hemisphere and the status of Latin American countries. Even more recently in the course of history, President Harry Truman has exercised the power of the President concerning foreign relations. Wishing to contain the Communism only where it already existed and to help European nations with Democracy to keep it as their governmental structure, Truman adopted the Truman Doctrine and the Marshall Plan. These policies of Truman Administration provided economic support to rebuild the nation after the tragic World Wars and to resist the influence of Communism. Truman—acting to prevent a situation where having to use his recognition powers to deny the Communist government and thus worsening diplomatic relationships—showcased the responsibility of the presidential recognition power to the world.

The Judicial Branch of the United States has set significant precedents which interpret so that the Executive Branch has authority over the foreign affairs as well as implying that the recognition power also belongs to the President. In the Supreme Court cases, *United States v. Curtiss-Wright Export Corp* (1936) and *Goldwater v. Carter* (1979), the Supreme Court ruled that the Executive Branch has sovereignty of conducting matters dealing with foreign affairs by its constitutionally mandated powers, reiterating the power of the Executive Branch. The Supreme Court also heard the case, *The National City Bank of New York v. The Republic of China et al* (1955). The significance of this case is that the Supreme Court acknowledged the recognition power of the Executive Branch by accepting to hear the case involving a foreign state that now has a standing to sue in the United States government since the Executive Branch recognized its sovereignty. The Supreme Court has established the power of the Executive Branch to execute its foreign duties as well as to acknowledge the Executive Branch's recognition power.

In an attempt to maintain neutrality over the dispute of the status of Jerusalem, the Executive Branch of the United States has avoided recognizing any country as sovereign over Jerusalem. The Foreign Relations Authorization Act passed by the Legislative Branch of the United States is a legislative veto by definition as it requires the Secretary of State to list the birthplace of a Jerusalem-born citizen as Israel if requested. As previously stated, the Legislative Branch may attempt to influence informally the Executive's recognition power. However, the Legislative Branch cannot directly infringe or execute the powers granted to the Executive Branch itself due to the one of the fundamental principles of the United States Constitution and the structure of the government of the United States—*separation of powers*. This principle is emphasized by Founding Father James Madison through *The Federalist No. 10*, *The Federalist No. 47*, and *The Federalist No. 51*. Madison explains that the new government would be organized so that its powers are divided and assigned to different branches of the government which in consequence will result in fair democracy. Using this principle as a guide and setting a precedent, the Supreme Court has deemed legislative veto—an act by the Legislative Branch on the Executive Branch to limit its powers—unconstitutional in *Immigration and Naturalization Service v. Chadha* (1983) and *Alaska Airlines, Inc. v. Brock* (1987). In the current case, *Zivotofsky v. Kerry*, the petitioner has sued the Secretary of State because of his noncompliance of the Foreign Relations Act, which requires the Secretary of State to list the place of birth as Israel if requested by the applicant. This law effectively conflicts with the foreign policy of the Executive Branch which explicitly states that the applicant can write the city of birth instead of country of birth if the applicant was born in a place with ongoing disputes (7 Foreign Affairs Manual 1380). As the Executive Branch wishes not to recognize Israel as having sovereignty of Jerusalem to avoid any

foreign conflicts which may be harmful to the nation, the Executive Branch has instituted this policy and has traditionally been listing the name of the city. The requirement of the Foreign Relations Authorization Act is thus a legislative veto with which the Legislative Branch attempts to control the duty of Executive Branch and is in violation of separation of powers. The Supreme Court has already established its precedent that legislative vetoes are unconstitutional, therefore the petitioner theoretically does not have any standing to sue and the Executive Branch should be left to conduct its foreign policy.

Conclusion:
According to the Constitution of the United States, the intentions of the Founding Fathers, Supreme Court case precedents, and the tradition developed from historical events, the recognition power is primarily assigned to the President of the United States. That power should not be subject to control by other branches of the government because of the principle of the separation of powers; thus the Section 214 of Foreign Authorizations Act is unconstitutional and the Executive Branch should have the right to deny listing a Jerusalem-born citizen's birthplace as Israel. By listing the birthplace of Zivotofsky as Israel and therefore setting a precedent, the event will eventually amount to a formal recognition of Jerusalem as a part of Israel which violates the President's foreign policy. Therefore, the decision of the court of appeals should be affirmed.