
Congressional Funding Speaks Louder than Presidential Words: Cold, Hard Cash Versus the Recognition Power

“[H]e shall receive Ambassadors and other public Ministers”¹

I. INTRODUCTION

In August, 2014, United States lawmakers approved an additional \$225 million to support Israel’s missile defense system known as the Iron Dome.² Less than one month later, in September, 2014, the Supreme Court of the United States set Docket Number 13-628, *Zivotofsky ex rel. Zivotofsky v. Kerry*,³ for argument.⁴ The Court in *Zivotofsky v. Kerry* examined a federal statute known as the Foreign Relations Authorization Act (FRAA).⁵ The central issues of *Zivotofsky* probed whether the FRAA infringed upon the executive branch’s recognition power and if it does, whether the recognition power is exclusive to the President.⁶

Specifically, *Zivotofsky* asked the Court to allow parents to direct the U.S. State Department to record Israel, instead of only the city designation of Jerusalem, on their child’s passport to denote their child’s birthplace abroad.⁷

1. U.S. CONST. art. II, § 3.

2. See Dana Bash & Tom Cohen, *Congress Approves More Money for Israel’s Iron Dome*, CNN (Aug. 27, 2014, 3:45 PM), <http://www.cnn.com/2014/08/01/politics/congress-israel-iron-dome/index.html?iref=allsearch> [<http://perma.cc/K9MC-F7LP>].

3. 135 S. Ct. 2076 (2015).

4. See *Zivotofsky v. Kerry*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/zivotofsky-v-kerry/> (last visited Sept. 24, 2014) [<http://perma.cc/SR89-MVF7>]; see generally *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

5. See *Zivotofsky*, 135 S. Ct. at 2078; see also Foreign Relations Authorization Act, Pub. L. No. 107-228, § 214 (d), 116 Stat. 1350 (2003) (mandating, upon request, Israel be recorded as birthplace for U.S. citizen born in Jerusalem). The language at issue states: “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.” *Zivotofsky*, 135 S. Ct. at 2076.

6. See *Zivotofsky*, 135 S. Ct. at 2081 (2015) (stating two key issues in case). The act of recognition is defined as a state’s commitment to treat an entity as a state or to treat a regime as the government of a state. RESTATEMENT (SECOND) OF FOREIGN RELATION LAW § 94 (AM. LAW INST. 1965).

7. See *Zivotofsky*, 135 S. Ct. at 2083 (describing facts of case). Menachem Binyamin Zivotofsky’s mother, a United States citizen, living in Jerusalem, originally requested that her son’s passport and consular report of birth abroad list his place of birth as Jerusalem, Israel in an attempt to exercise what she believed was a guarantee of Section 214(d) of the FRAA to U.S. citizens. See *id.* The child’s parents contested that they, “as a matter of conscience,” did not want Menachem’s “Israeli nativity” to be forgotten. *Zivotofsky*, 135 S. Ct. at

While the child was born in Jerusalem, and the FRAA permits the State Department to recognize a certain location on passports at the request of parents, presidents have repeatedly refused inclusion of the designation of Israel to refer to the sovereign of the city of Jerusalem on the official document.⁸ Both Presidents Barack Obama and George W. Bush have argued that the President has the exclusive power to direct the nation's foreign policy and that Arabs and Israelis should decide the status of Jerusalem sovereignty—not the United States.⁹

The Executive relies primarily on Article II, Section 3 of the United States Constitution to assert that only the President has the power of sovereign recognition.¹⁰ Specifically, the Constitution states the President “shall receive Ambassadors and other public Ministers . . .” and therefore, only the President, not Congress without presidential endorsement, may recognize Jerusalem as a city under Israel's rightful control.¹¹ The Executive argues that issuing an

2117 (Scalia, J., dissenting). After Zivotofsky's parents objected and brought suit in court, the Zivotofskys changed their request to conform to the precise language of the FRAA that just Israel, instead of Jerusalem, Israel, must be listed on their child's passport. See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1426 (2012); see also Adam Liptak, *Justices Take Case on Status of Jerusalem in Passports*, N.Y. TIMES (Apr. 21, 2014), http://www.nytimes.com/2014/04/22/us/supreme-court-case-on-status-of-jerusalem-in-american-passports.html?_r=2 [<http://perma.cc/BA83-LTQJ>] (describing case implies State Department treat Israel as sovereign of Jerusalem).

8. See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083 (2015) (confirming where petitioner born); see also *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 216-17 (D.C. Cir. 2013) (confirming American presidents' refusals to recognize any nation's claim of control of Jerusalem as legitimate), *cert. granted sub nom. Zivotofsky ex rel. Zivotofsky v. Kerry*, 134 S. Ct. 1873 (2014), and *aff'd sub nom. Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

9. See *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 200 (D.C. Cir. 2013) (stating “presidents from Truman on have consistently declined” to recognize Israel's sovereignty over Jerusalem), *cert. granted sub nom. Zivotofsky ex rel. Zivotofsky v. Kerry*, 134 S. Ct. 1873 (2014), and *aff'd sub nom. Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). Since the FRAA's inception in 2002, George W. Bush (who notably signed the Act into law) and Barack Obama persist that the United States will not follow the law because it infringes on the President's recognition power. See *id.* at 202, 220. For over half of a century, U.S. presidents have claimed neutrality on the question of sovereign control over the city of Jerusalem. See *id.* at 200. When George W. Bush signed the act into law, he stated that “U.S. policy regarding Jerusalem has not changed.” *Id.* at 203.

10. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2079 (2015) (describing history and power of clause). The Court explains that the Founding Fathers intended the phrase to harbor great power for the Executive because during the middle-to-late eighteenth century, receiving an ambassador was an act that recognized the sending state's legitimacy. See *id.* The Court goes on to say that through this line of reasoning one would understand this clause to grant power to the Executive in recognizing other sovereigns. See *id.* The Court notes the Constitution does not ever use the word recognition, but instead the recognition power derives from the Reception Clause, that is, Art. II, Section 3. See *id.* at 2084-85.

11. U.S. CONST. art. II, § 3; see also Elizabeth Price Foley, *Court Shouldn't Diminish President's Foreign Policy Authority*, N.Y. TIMES (Nov. 17, 2014, 4:18 PM), <http://www.nytimes.com/roomfordebate/2014/04/22/can-congress-overstep-its-role-in-foreign-policy/court-shouldnt-diminish-presidents-foreign-policy-authority> [<http://perma.cc/46PL-KSXX>] (suggesting congressional passport power not necessarily at stake but serious ramifications for American foreign relations). The recognition power is described in *Zivotofsky* through the Restatement (Third) of Foreign Relations Law of the United States as a formal acknowledgment that a territory has the qualifications for statehood or that the entity's system is an effective system of rule for that particular sovereign. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. a

official U.S. passport stamped with Israel denoting the holder's birthplace in Jerusalem is unconstitutional because the Executive does not wish to recognize Jerusalem as a city in the nation of Israel.¹²

Upon a closer look, however, the United States recognizes Israel in a significant economic respect: Israel is the largest recipient of U.S. Foreign Military Financing (FMF) of all foreign nations, and for fiscal year 2016 (FY2016) President Obama requested funding for Israeli FMF at 53% of the total requested FMF worldwide.¹³ Furthermore, the United States created a ten-year Memorandum of Understanding (MOU) to provide \$30 billion in military aid grants from FY2009 to FY2018.¹⁴ During President Obama's visit to Israel in March of 2013, the President also guaranteed multi-year pledges of military aid to Israel, subject to the approval of Congress.¹⁵

In light of presidents' consistently requested and approved defense funding

(AM. LAW INST. 1987).

12. See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2082 (2015) (reflecting upon passports seen as echoes of American foreign policy argument). The Executive argues that the United States does not recognize any country as having sovereignty over Jerusalem, but issuing a passport with the designation Jerusalem, Israel creates a statement that instructs the world otherwise. See *id.*

13. See JEREMY M. SHARP, CONG. RESEARCH SERV., RL33222, U.S. FOREIGN AID TO ISRAEL 4 (2015), <http://fas.org/sgp/crs/mideast/RL33222.pdf> [<http://perma.cc/NBP8-AAP4>] (outlining ten-year military aid agreement commenced in 2007). Between 1946 and 2012, the United States provided over \$116.3 billion in total loans and grants of economic and military assistance to Israel. See U.S. AGENCY FOR INT'L DEV. (USAID), CONG-R-0105, U.S. OVERSEAS LOANS AND GRANTS: OBLIGATIONS AND LOAN AUTHORIZATIONS, JULY 1, 1945–SEPTEMBER 30, 2012 8 (2012) [hereinafter USAID 2012] (summarizing approximately \$82.1 billion in military assistance and \$34.2 billion in economic assistance). The United States tracks financial provisions to Israel beginning with legislative authority of Post-War Relief in 1946-1948. *Id.* at viii; see also JOHN J. MEARSHEIMER & STEPHEN M. WALT, THE ISRAEL LOBBY AND U.S. FOREIGN POLICY 24 (2007) (discussing amount of foreign aid Israel received from American taxpayers). The bulk of funding to Israel in 2012 was in the form of direct grants rather than loans. See USAID 2012, *supra*, at 8; see also Noura Erakat, *U.S. Should Stop Funding Israel, or Let Others Broker Peace*, N.Y. TIMES (May 7, 2015, 2:02 PM), <http://www.nytimes.com/roomfordebate/2014/08/05/can-the-us-still-be-a-leader-in-the-middle-east/us-should-stop-funding-israel-or-let-others-broker-peace> [<http://perma.cc/Z9SZ-69SL>].

14. See SHARP, *supra* note 13, at 4 (outlining ten-year military aid agreement commenced in 2007).

15. JOSH RUEBNER, U.S. CAMPAIGN TO END THE ISRAELI OCCUPATION, U.S. MILITARY AID TO ISRAEL: POLICY IMPLICATIONS & OPTIONS 8 (2012), http://www.endtheoccupation.org/downloads/Policy_Paper_print.pdf [<http://perma.cc/Z4JJ-2RMQ>]. The Bush Administration's MOU also provided an approximate 25% annual average increase in aid each year. See *id.* The incremental increases in aid spread across fiscal years as such: \$150 million in U.S. military aid to Israel in FY2009, and in both FY2010 and 2011, the MOU carved out \$225 million. See *id.* Bush's MOU planned to provide Israel with \$75 million in FY2012 and \$25 million in FY2013 to "plateau" at \$3.1 billion annually until the MOU concluded. *Id.* The MOU also enabled Israel to ask Congress to spend 26.3% of its military aid on Israeli-produced military arms, while all other recipients of U.S. military aid are required to use 100% of the funding to buy military arms from U.S.-based corporations. See *id.* Former Secretary of State for Political Affairs, Nicholas Burns, who signed the MOU, stated the executive branch considered the \$30 billion in military aid as an "investment in peace—in long-term peace." SHARP, *supra* note 13, at 4 (describing rationale for 2007 ten-year military aid agreement). There have also been discussions of future military aid extending beyond 2018, during which Israel is reportedly seeking between \$4.2 and \$4.5 billion in annual FMF. See *id.* at 4-5. Specifically, the United States provides substantial funding for Israel's Iron Dome and through June 10, 2015, the U.S. gave more than \$1.28 billion to Israel for missile batteries, missile interceptors, coproduction costs, and general maintenance for the Iron Dome missile defense system. See *id.* at 9-10.

to Israel, the Supreme Court confirms in *Zivotofsky* that the Executive's contemporary recognition power no longer harbors any significance.¹⁶ In *Zivotofsky*, while the Executive rightfully prevailed, each Justice refused to acknowledge the Executive's hypocritical stance: presidents argue no country has sovereignty over Jerusalem, yet presidents continually provide military funding to Israel to further Israeli occupation and control of Jerusalem.¹⁷ For well over half of a century, the Executive has approved substantial military aid to Israel by signing into law congressionally-backed legislation to provide weapons and funding overseas.¹⁸ Therefore, as the Supreme Court does not address the Executive's *financial* recognition of Israel, but rather states the Executive's *spoken* recognition is at odds with Section 214(d) in *Zivotofsky*'s case, the Supreme Court reduces the recognition power to a frivolous formality, one with little tangible impact in the modern realm of foreign policy.¹⁹

This Note will address the U.S. military funding at odds with the Supreme Court's ruling that the Executive's claim of neutrality is paramount and trumps the exercise of Section 214(d) as the United States must "speak with one voice" on the matter of Israeli-Palestinian foreign policy.²⁰ This Note will begin with a brief discussion of the history surrounding the Israeli-Palestinian territorial dispute, including U.S. involvement with Israel throughout the twentieth and twenty-first centuries.²¹ This Note will then examine the history of the recognition power, cited in the U.S. Constitution, as it relates to the presidential argument in *Zivotofsky*.²² Following, this Note will consider *Zivotofsky*, its

16. Compare *infra* Part II.B (highlighting United States aid to Israel after World War II to present), and *infra* Part II.C (citing chronology of recognition power and relation to *Zivotofsky*), with *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015) (defining recognition as Executive's oral acknowledgement of nation's sovereignty).

17. Compare USAID 2012, *supra* note 13, at 8 (reporting data of U.S. foreign economic or military assistance), with *infra* Part II.B (describing U.S. modern funding to Israel including military aid supporting Israeli defense of parts of Jerusalem), and *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2076-2126 (2015) (showing majority, concurrence, and dissent do not acknowledge extent of Military Funding to Israel).

18. See USAID 2012, *supra* note 13, at 8 (reporting U.S. foreign assistance to Israel categorized as either economic or military assistance).

19. Compare *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2076-96 (2015) (omitting reference by majority to Executive support of Israel through military assistance), with *infra* Part II.B (showing decades of funding to Israel for military fortifications against Palestinian attacks), and *Zivotofsky*, 135 S. Ct. at 2086 (stating FRAA unconstitutional as nation must "speak with one voice" on Jerusalem status). In his dissent, Justice Scalia at least acknowledges Congress's view that Israel controls the city of Jerusalem in modern day, while no other Justices make similar concessions. Compare *Zivotofsky*, 135 S. Ct. at 2076-2126, with *id.* at 2116-17 (Scalia, J., dissenting).

20. See generally *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (ruling 214(d) invalid because Congress cannot command Executive to contradict earlier recognition determination). The Court states the Nation must speak with a single voice, which must be the President's voice, on the issue of foreign recognition. See *Zivotofsky*, 135 S. Ct. at 2086. But see *infra* Part II (describing modern Executive support for Israeli-control of Jerusalem).

21. See *infra* Parts II.A-B (discussing history of development of Israel post World War II and United States support).

22. See *infra* Parts II.C.1-2 (considering various perspectives of recognition power as read by Court over

appeal, and the Supreme Court's final decision on the matter.²³ This Note will then conclude with a discussion of possible repercussions surrounding the outcome of the case as it relates to the future of U.S. involvement in the territorial conflict between Israel and Palestine.²⁴

II. HISTORY

A. *United States and Israel: Post World War II to Present Day*

1. *Support*

Following World War II, on May 8, 1946, President Harry Truman wrote to British Prime Minister Clement Attlee urging Great Britain to allow Jewish people to immigrate to British-occupied Palestine following the Holocaust.²⁵ Truman's support for the move was boisterous, but U.S. military leaders—who believed the political push for Jewish immigration would cause bloodshed abroad—opposed any action that would cause U.S. armed forces to commit to, or even monitor, the region.²⁶ The United States State-War-Navy Coordinating

years).

23. See *infra* Part II.C.3 (recounting *Zivotofsky's* district court, appeal, and Supreme Court outcome over ten plus years of litigation).

24. See *infra* Part IV (predicting repercussions of recent ruling).

25. See Raymond H. Geselbracht, *The United States and the Recognition of Israel: A Chronology*, HARRY S. TRUMAN LIBR. & MUSEUM, <http://www.trumanlibrary.org/israel/palestin.htm> (last visited Nov. 29, 2015) [<http://perma.cc/M3S7-Q2CB>] [hereinafter *Recognition: A Chronology*]. In his letter to Prime Minister Atlee, Truman cites the intention of a report issued by the Anglo-American Committee of Inquiry—a joint American and British appointed coalition—which was to:

examine the political, economic and social conditions in Palestine as they bear upon the problem of Jewish immigration and settlement therein and the well-being of the peoples now living therein . . . to enable [Jewish people] to live free from discrimination and oppression and to make estimates of those who wish or will be impelled by their conditions to migrate to Palestine or other countries outside Europe.

Id.; see also The Avalon Project: Documents in Law, History and Diplomacy, *Anglo-American Committee of Inquiry – Report to the United States Government and His Majesty's Government in the United Kingdom*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR., http://avalon.law.yale.edu/20th_century/angpre.asp (last visited Nov. 29, 2015) [<http://perma.cc/PWA6-HXC3>] [hereinafter *Anglo-American Committee of Inquiry – Report*]. The Anglo-American Committee of Inquiry submitted the report in Lausanne, Switzerland on April 20, 1946, and recommends that Great Britain grant 100,000 Jewish people entrance into Palestine. See *Anglo-American Committee of Inquiry – Report, supra*. The report states:

We recommend (a) that 100,000 certificates be authorized immediately for the admission into Palestine of Jews who have been the victims of Nazi and Fascist persecution; (b) that these certificates be awarded as far as possible in 1946 and that actual immigration be pushed forward as rapidly as conditions will permit.

Id. at ch. I.

26. See Memorandum from Joint Chiefs of Staff on British Proposals in Connection with the Report of the Anglo-American Committee of Inquiry on Palestine to the State-War-Navy Coordinating Comm. (June 21,

Committee (SWNCC) issued a Joint Chiefs of Staff memorandum on June 21, 1946, warning against Truman's recommendation for Jewish movement to British-occupied territory in Palestine.²⁷ The SWNCC strongly opposed the involvement of armed forces because it noted that there might be serious consequences that would challenge current control of the region and prejudice delicate U.S. interests in the Middle East.²⁸

Although the SWNCC cautioned Truman that his support could have disastrous U.S. military implications, President Truman moved ahead, vocally endorsing Jewish movement into British-occupied Palestine, both domestically and overseas.²⁹ Less than two years later, on November 29, 1947, the United Nations (U.N.) approved Resolution 181.³⁰ Resolution 181 terminated the British Mandate in Palestine and created independent Jewish and Arab States with a special international regime for the City of Jerusalem.³¹

1946) (on file with the Truman Library), http://www.trumanlibrary.org/whistlestop/study_collections/israel/large/documents/newPDF/2-14.pdf#zoom=100 [http://perma.cc/3MK6-Z8NR].

27. *See id.*

28. *See id.* The memorandum urges that no U.S. armed forces participate in helping implement the Anglo-American Committee of Inquiry's suggestion of allowing Jewish people to immigrate to Palestine despite Truman's endorsement. *See id.* at 1; *see also Anglo-American Committee of Inquiry – Report, supra* note 25, at ch. I (citing Recommendation No. 2 of 100,000 certificates for Jewish admission into Palestine). The SWNCC report emphasizes that a contribution to mitigating disturbances in Palestine through employing military personnel from the United States would “unnecessarily risk such serious disturbances throughout the area [and] . . . the Middle East could well fall into anarchy and become a breeding ground for world war.” *Anglo-American Committee of Inquiry – Report, supra* note 25, at ch. I. The SWNCC was also concerned that if the United States did commit military support to implement the emigration of Jewish people, backlash in the Middle East would enable the Soviet Union to increase its communist power in the region and jeopardize U.S. access to Middle Eastern oil. *See Geselbracht, supra* note 25.

29. *See Geselbracht, supra* note 25. On October 4, 1946, the eve of Yom Kippur, President Truman issued a statement showing United States support for the creation of a Jewish State. *See id.* Some political theorists considered Truman's Yom Kippur statement a shameless political move to win the Jewish vote. *See* MICHAEL J. COHEN, *PALESTINE TO ISRAEL: FROM MANDATE TO INDEPENDENCE* 204 (1988). Truman maintained, however, that “Presidents have often made statements on this holiday [Yom Kippur], so the timing was nothing unusual, and what I said was simply a restatement of my position; namely, that I wanted to see one hundred thousand Jews admitted to Palestine.” *Id.* On October 28, 1946, Truman wrote a letter to the King of Saudi Arabia, restating his support for a Jewish homeland in Palestine. *See Geselbracht, supra* note 25. Truman's letter was frank in describing his desire to see Jewish survivors of World War II enter Palestine to establish shelter and add aptitudes to the creation of a Jewish National Homeland. *See Harry Truman Administration: Message to the King of Saudi Arabia Concerning Palestine (October 28, 1946)*, JEWISH VIRTUAL LIBR., http://www.jewishvirtuallibrary.org/jsource/US-Israel/truman_Palestine6.html (last visited Nov. 11, 2014) [http://perma.cc/W48G-ZBV3]. Truman also wrote:

It was my belief, to which I still adhere, and which is widely shared by the people of this country, that nothing would contribute more effectively to the alleviation of the plight of these Jewish survivors than the authorization of the immediate entry of at least 100,000 of them to Palestine.

Id.

30. *See* G.A. Res. 181 (II), U.N. Doc. A/RES/181(II) (Nov. 29, 1947) [hereinafter Resolution 181].

31. *See id.* at Annex B (explaining partition plan includes detailed map of divided territory mandates); *see also* Noura Erakat, *Litigating the Arab-Israeli Conflict: The Politicization of U.S. Federal Courtrooms*, 2 BERKELEY J. MIDDLE E. & ISLAMIC L. 27, 30 (2009). On July 24, 1922, the League of Nations temporarily

2. Recognition

On May 14, 1948, Israel's first prime minister read Israel's Declaration of Independence proclaiming that a Jewish State called Israel shall be born the next day, May 15, 1948, at 12 a.m. Palestinian time.³² At midnight, the British Mandate for Palestine expired and eleven minutes later the United States recognized Israel as a Jewish State in Palestine on a de facto basis.³³ The same day the United States officially recognized the Jewish State, Egypt, Lebanon, Syria, Trans-Jordan, and Iraq launched an attack on the newly declared nation.³⁴ The war later resulted in geographic division of territory initially promised to Palestinians by Resolution 181, including portions of Jerusalem.³⁵ Despite the warring nations, the United States continued to support Israel with an official declaration of de jure recognition on January 31, 1949.³⁶

authorized Great Britain's rule of Palestine—territory the Turkish Empire previously controlled—in signing the Palestine Mandate, also known as the British Mandate for Palestine. See The Avalon Project: Documents in Law, History and Diplomacy, *The Palestine Mandate*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR., http://avalon.law.yale.edu/20th_century/palmanda.asp (last visited Oct. 30, 2015), [<http://perma.cc/FJK3-UGT2>]. Resolution 181 suggested 45% of territory at issue go to the Palestinian population while the Jewish population should take 55% of the territory. See Erakat, *supra*. See generally Resolution 181, *supra* note 30. The Resolution also stated that military forces should withdraw from Palestine as soon as possible, but should be fully withdrawn no later than August 1, 1948. See *id.* at pt. I.A.2.

32. Geselbracht, *supra* note 25 (describing time and date David Ben-Gurion read Israel's Declaration of Independence). The Declaration proclaimed that homelessness was an urgent issue for Jewish people following World War II, and reestablishing the Jewish State would enable Jewish people to assert their right to a land to which they had historic ties. See *Declaration of Establishment of State of Israel*, ISRAEL MINISTRY OF FOREIGN AFF., <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx> (last visited Nov. 29, 2015) [<http://perma.cc/EJJ7-4AT8>]. In the Declaration, the new State was also described as an establishment that would confer upon Jewish people the status of one belonging to the society of nations. See *id.*

33. See Geselbracht, *supra* note 25 (noting time and date British Mandate for Palestine expired); see also Statement of the President re: Recognition of Israel, May 14, 1948 (handwriting of the President on file with Alphabetical Correspondence File, 1916-1950; Ross Papers), http://www.trumanlibrary.org/exhibit_documents/index.php?tlid=1948-05-14&groupid=3429&pagenumber=1&collectionid=ROlexhibit [<http://perma.cc/C6M5-8N55>] (citing U.S. official recognition of Israel with Harry Truman's signature). The recognition of the de facto authority of the new state of Israel included handwritten edits from President Truman, who added the word "provisional" to the statement's first paragraph. See *id.* The first sentence of the recognition statement subsequently reads, "[a] Jewish state has been proclaimed in Palestine, and recognition has been requested by the provisional Government thereof." *Id.* It is important to note in 1948 more than 700,000 Arabs were either expelled or fled from the area under Jewish occupation as a result of the momentum surrounding fear of expulsion and Jewish terrorism. See John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. INT'L L.J. 171, 179 (1998).

34. Allison M. Fahrenkopf, *A Legal Analysis of Israel's Deportation of Palestinians from the Occupied Territories*, 8 B.U. INT'L L.J. 125, 135 (1990) (recounting surrounding nations' attack on Israel as resulting in "full-scale war"). Before 1948, Palestinian Arabs commenced guerilla attacks on the Jewish people in the Israeli-occupied territories in attempts to thwart the Partition Resolution. See *id.* at 134.

35. See *id.* at 135. As a result of the war, Palestinian territories were taken to supplement Jordan, Egypt, and Israel. See *id.* at 135-36. The 1948 invasion resulted in Jordanian control of the West Bank—an area primarily designated to comprise the heartland of the new Palestinian state. *Id.* At the same time, the Gaza Strip became an Egyptian territory, and Israel secured control of half of Jerusalem, which was not allotted to Israel in Resolution 181. See *id.*

36. See Press Release, Harry S. Truman, President (Jan. 31, 1949) (on file with the Truman Papers, Harry

3. Assistance

President Truman played a key political role in the establishment of a Jewish State in Palestine through his expedient, vocal support for the U.N. partition plan in 1947.³⁷ Yet, in the early days of establishing Israel's statehood, the United States did not extend sizeable financial support for fear of jeopardizing relations with Arab countries.³⁸ The United States did not supplement any official military loan program to Israel until 1959, and from 1949 to 1965, U.S. aid to Israel consisted predominantly of economic development assistance and food aid.³⁹

The United States did not begin to provide substantial funding and heavy military assistance to Israel, compared to U.S. support of other nations, until 1967, the same year of the Six-Day War.⁴⁰ By 2015, U.S. financial support to

S. Truman Library and Museum), http://www.trumanlibrary.org/whistlestop/study_collections/israel/large/documents/index.php?documentdate=1949-01-31&documentid=1-15&collectionid=ROI&pagenumber=1 [<http://perma.cc/8V5F-AL3T>] (declaring permanent government elected in Israel spurred U.S. proclamation of de jure recognition). On October 24, 1948, President Truman promised that the United States would recognize Israel on a de jure basis after the election of a permanent government. *See id.* The territory held elections on January 25, 1949. *See id.*

37. *See* MEARSHEIMER & WALT, *supra* note 13, at 24 (stating Truman's backing affected creation of Jewish homeland); *see also* Correspondence between Dean Alfange, Harry Vaughan, and Harry S. Truman (May 5, 1948) (on file with President's Secretary, Truman Papers), http://www.trumanlibrary.org/whistlestop/study_collections/israel/large/documents/index.php?pagenumber=1&documentdate=1948-05-05&documentid=2-25&collectionid=ROI [<http://perma.cc/54M2-2GXF>] (citing Truman's claim no American gave Israel more "time and thought" than Truman); Educ. Team Staff Members, *Teaching with Documents Lesson Plan: The U.S. Recognition of the State of Israel*, NAT'L ARCHIVES, <http://www.archives.gov/education/lessons/us-israel/> (revised Aug. 23, 2006) [<http://perma.cc/YCQ5-EMCH>] [hereinafter *Teaching with Documents*] (acknowledging expediency of Truman's recognition angered U.S. delegates to U.N. and State Department officials). Truman issued a press release to United States outlets notifying the country of the recognition of the new state of Israel before he notified the appropriate U.N. and State Department employees who were actually negotiating the issue. *See Teaching with Documents, supra.*

38. *See* CLYDE R. MARK, CONG. RESEARCH SERV., IB85066, ISRAEL: U.S. FOREIGN ASSISTANCE CRS-13 tbl.3 (2005), <https://www.fas.org/sfp/crs/mideast/IB85066.pdf> [<https://perma.cc/KV36-VQ4R>] (noting total assistance to Israel from 1949-1996); *see also* MEARSHEIMER & WALT, *supra* note 13, at 24 (describing America's desire for peace with Arab community); Immediate Release, Statement by the President on the Position of the United States in the United Nations Regarding Palestine (Mar. 25, 1948) (on file with the Truman Papers), http://www.trumanlibrary.org/whistlestop/study_collections/israel/large/documents/index.php?documentdate=1948-03-25&documentid=3&collectionid=ROI&pagenumber=1 [<http://perma.cc/3PKY-CV6R>] [hereinafter Statement by the President] (acknowledging imminence of violence in Middle East post establishment of Israel). Truman shifts the responsibility away from America's military as an entity that should work to ensure peace between Arabs and Jewish people, and onto the U.N. as the appropriate organization that must create a peaceful truce between the Arabs and the Jewish people amid the bloodshed resulting from Israel's settlement. *See* Statement by the President, *supra.*

39. *See* MARK, *supra* note 38, at CRS-1 (describing analysis helping to populate chart on U.S. financial aid to Israel from 1949-1996). Between 1949 and 1965, the United States gave approximately \$63 million every year to Israel, but this aid increased to about \$102 million from 1966 through 1970, and military assistance increased to 47% of the total. *See id.* From 1971 to 2005, the United States aided Israel with about \$2 billion per year, and over 66% of the figure found form in military assistance. *See id.*

40. *See* MARK, *supra* note 38, at tbl.3 (citing funding total to Israel in 1967 and subsequent years). Israel received \$23.7 million in 1967 from the United States, and this figure increased to nearly five times that amount to \$106.5 million in 1968. *See id.* The real change in funding took place after the commencement of

Israel was exponentially larger than in 1967.⁴¹ For example, in 2013 the United States Missile Defense Agency (MDA) requested \$55 million for a FY2016 Iron Dome coproduction program with Israel.⁴² Additionally, Section 1669 of the House version of the National Defense Authorization bill for FY2016 called for \$41.4 million to fund Iron Dome components; the Senate's version of the bill made the same authorization.⁴³

B. United States and Israel: Modern Funding

1. Military Aid

In 2015, Israel remained the leading cumulative recipient of foreign aid from the United States since World War II.⁴⁴ U.S. military aid to Israel helped transform the country's army into a sophisticated force.⁴⁵ The United States provides almost all of its aid as a single donor to Israel in the form of FMF.⁴⁶ The Israeli FMF represents approximately half of the total U.S. FMF to other countries and comprises 20% of the Israeli defense budget.⁴⁷ Israel expects an additional \$3.1 billion in FMF from FY2015 to FY2018 and is estimated to use 75% of its aid to purchase arms from the United States.⁴⁸ In the past, the

the Six-Day War. See MEARSHEIMER & WALT, *supra* note 13, at 25-26.

41. See Consolidated Appropriations Act, Pub. L. No. 113-76, 128 Stat. 5, 122 (2014); see also SHARP, *supra* note 13, at 12 (describing most recent aid to Israel from U.S. government). The United States has provided Israel with \$124.3 billion in assistance from post World War II up through 2014. See SHARP, *supra* note 13, at summary. Almost all of the aid from the United States to Israel has transformed into military assistance for the nation. See *id.*

42. See SHARP, *supra* note 13, at summary.

43. *Id.* at 10. The National Defense Authorization bill provides \$55 million for the Iron Dome in FY2016. *Id.* In 2013, the United States requested its heaviest military support to date, with \$3.1 billion in FMF for Israel and an additional \$504.1 million to support research, development, and production of Israel's Iron Dome and the production of the joint United States-Israel missile defense system. See Consolidated Appropriations Act, 128 Stat. at 122.

44. SHARP, *supra* note 13, at summary. Requests found in reports on Defense Budget Appropriations for U.S.-Israeli Missile Defense show that for FY2015, the United States requested \$619.81 million in funding to fortify Israel military defense systems. See *id.* at 13. FY2016 legislation includes: a draft bill that would provide \$3.1 billion in Israeli FMF; \$371.2 million for various U.S.-Israeli joint missile defense systems, weapons called the Iron Dome, David's Sling, Arrow 3, and Arrow 2 missile defense systems; a Senate version of the National Defense Authorization bill, authorizing up to \$372.4 million for joint U.S.-Israeli weapon systems; and a draft House Defense Appropriations bill providing \$487.59 million for joint U.S.-Israeli missile defense programs (\$55 million of the total for the Iron Dome, \$286.526 for David's Sling, \$89.55 million for Arrow 3, and \$56.52 million for Arrow 2). See *id.* at summary. In 2014, Israel was also a top recipient of U.S. foreign aid. See JIM ZANOTTI, CONG. RESEARCH SERV., RL 33476, ISRAEL: BACKGROUND AND U.S. RELATIONS summary (2015), <http://www.fas.org/sgp/crs/mideast/RL33476.pdf> [<http://perma.cc/977M-VGLF>].

45. See ZANOTTI, *supra* note 44, at 29. This report also states aid for Israel from the United States over the years is designed to provide a "qualitative military edge" (QME) over militaries of neighboring countries. *Id.*

46. See *id.* at 34.

47. See ZANOTTI, *supra* note 44, at 34 (describing current financial relationship between U.S. and Israel). Since World War II, Israel has been the largest recipient of total U.S. foreign aid. See *id.*

48. See *id.* at 34. In late July of 2014, the Obama Administration did temporarily delay one or more

United States has provided financial assistance to Israel that is distinct from military funding, with a small portion of funding allocated for migration assistance through American Schools and Hospitals Abroad (ASHA) initiatives.⁴⁹ In 2013, such nonmilitary assistance ceased, and the vast majority of U.S. funding to Israel remains in the form of military grants.⁵⁰

2. *The Iron Dome*

The United States began to support the technological development of Israel's Iron Dome in FY2011.⁵¹ The Iron Dome is a defensive, anti-rocket system that protects Israel's civilian population from rockets fired by Palestinian militants.⁵² Lawmakers touted the Iron Dome as critical for protecting Israeli citizens during the summer of 2014, in which Israeli and Palestinian militants were in conflict and weapons were fired from the Gaza strip.⁵³

Experts claim the Iron Dome is the fastest and most reliable anti-missile system created to date, with a strike down record of 87% of Palestinian militant missile targets aimed at Israel.⁵⁴ The system relies on radar that tracks the

Hellfire missile transfers to Israel after the U.S. had sold 120 mm tank rounds and 40 mm illumination rounds for grenade launchers from the War Reserves Stock Allies-Israel program to Israel during the Israel-Gaza conflict. *See id.*

49. *See id.* at 34-35. Between 1949 and 1996, the United States provided \$121.4 million in the form of ASHA funding to Israel, compared to \$29,014.9 million in military grants. *See id.* at 34-35. In total, after 1949, the United States has provided \$73,723.4 million in military grants to Israel, compared to a notably smaller portion of ASHA aid at \$162.07 million. *See id.* at 35.

50. *See id.* ASHA funding ceased in 2013, after the United States provided ASHA aid of \$3 million—compared to a grant of \$3,075 million in military funding—to Israel that same year. *See id.* at 35. During the summer of 2014, Israel's Emergency U.S. Stockpile of munitions became of heightened concern due to Israel's current military operations in Gaza. *See SHARP, supra* note 13, at 14. Beginning in the 1980's, U.S. and Israeli leaders collaborated to build a stockpile of weapons for use in wartime emergency situations, and Section 514 of the Foreign Assistance Act of 1961 (22 U.S.C. § 2321h) "enables U.S. defense [material] that is stored in war reserve stocks to be transferred to a foreign [nation] through Foreign Military Sales or through grant military assistance." *Id.* In 2014, when a number of civilian casualties took place in the violent Israeli-Palestinian conflict, the *Wall Street Journal* reported that U.S. policy makers had not known about Israeli requests to access emergency U.S. stockpiles or about a separate deal to purchase Hellfire missiles; when, however, U.S. leaders became aware of the Israeli requests, the Obama Administration delayed transfers and did not approve another transfer until September of 2014. *See id.* U.S. State Department, Mari Harf, stated, "[W]ell, we generally don't talk about specific deliveries after they're requested . . . we're taking a little bit of additional care now given the situation, and if there were requests for such missiles, that would fall under that." *Id.* Due to the violence erupting between Israel and Palestine at the time, U.S. Administrators were portrayed in some instances as seeking more control over arms transfers when civilian casualties were reported. *See id.*

51. *See* Jeremy M. Sharp, *Israel's Iron Dome Anti-Rocket System: U.S. Assistance and Coproduction*, CRS INSIGHTS (Sept. 30, 2014), <http://fas.org/sgp/crs/mideast/IN10158.pdf> [<http://perma.cc/RD5T-Q8HJ>] (describing U.S. preliminary involvement with development of Iron Dome). Israel's Rafael Advanced Defense Systems originally developed and produced the Iron Dome in Israel. *See id.*

52. *See id.*

53. *See id.*

54. *See* N.P., *The Economist Explains: How Israel's "Iron Dome" Works*, *ECONOMIST* (July 15, 2014, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2014/07/economist-explains-12> (describing

trajectory of enemy rockets by calculating an offensive rocket's impact point.⁵⁵ Within seconds of the launch of an enemy rocket, the Iron Dome is able to launch its own defensive missile to lock onto the trajectory and shoot the enemy rocket down from the sky.⁵⁶ *The Jerusalem Post* reported that layers of missile defense, including the Iron Dome, are "crucial to [Israel's] survival, especially given [the Iron Dome's] 20-milewide waist at the center of the country."⁵⁷ On August 24, 2014, *The Jerusalem Post* reported that the Iron Dome successfully intercepted rockets fired toward Jerusalem from Gaza, a region of Israel bordering Egypt on the Mediterranean Sea, preventing ten rockets from detonating in the Jerusalem area.⁵⁸

In light of the Iron Dome's success, United States Congress moved on August 1, 2014, to pass the Emergency Supplemental Appropriations Resolution, 2014 (P.L. 113-145) to provide an additional \$225 million in funding for Israel's Iron Dome in FY2014.⁵⁹ President Obama signed the bill on August 4, 2014—three days after Congress introduced the resolution.⁶⁰ The additional funding raised United States defense appropriations for the Iron

benefits and mechanics of Iron Dome). The Iron Dome is the short-range element of three tiers of Israel's anti-missile defense system. *See id.* The other two tiers are called David's Sling, intended for longer-range defense in the atmosphere, and the Arrow system, designed to intercept ballistic missiles in space. *See id.*

55. *See id.*

56. *See id.*

57. Ariel Harkham, *Opinion: Upgrading Israel's Iron Dome with Swarmware*, JERUSALEM POST (Jan. 3, 2015, 9:29 PM), <http://www.jpost.com/Opinion/Upgrading-Israels-Iron-Dome-with-swarmware-386571> [<http://perma.cc/B2XC-DGEV>] (describing success of Iron Dome program in saving Israeli civilian lives). The opinion piece echoes the sentiment that Israel has a "qualitative edge" in the sky because of its missile defense program. *Id.*

58. See Ben Hartman, *Iron Dome Intercepts Rocket Fired Toward Jerusalem*, JERUSALEM POST (Aug. 24, 2014, 9:22 PM), <http://www.jpost.com/Arab-Israeli-Conflict/Iron-Dome-intercepts-rocket-fired-toward-Jerusalem-372156> [<http://perma.cc/3VLQ-ZE5J>]. The article reports rocket alerts sounding in Beit Shemesh, Abu Ghosh, and other locations around the capital, including the Erez Border Crossing. *Id.* Despite the rocket fire in the Jerusalem area, there were no reports of civilian injury or damage to the area. *See id.*

59. *See* Emergency Supplemental Appropriations Resolution, 2014 Pub. L. No. 113-145, 128 Stat. 1753 (2014) (providing additional \$225 million available to Israel for Iron Dome defense system). The resolution provides that funding shall be given "immediately" to "counter short-range rocket threats." *Id.*

60. *See id.*; *cf.* Letter from the President on Emergency Supplemental Appropriations Request To Address the Increase in Child and Adult Migration from Central America in the Rio Grande Valley Areas of the Southwest Border; and Wildfire Suppression to Speaker (July 8, 2014) (on file with the White House Office of the Press Secretary), <https://www.whitehouse.gov/the-press-office/2014/07/08/letter-president-regarding-emergency-supplemental-appropriations-request> [<http://perma.cc/KU7U-9BF2>] [hereinafter Letter from the President]. To put the emergency funding in perspective, President Obama requested Congress approve emergency funding just one month earlier for \$615 million in emergency wildfire suppression in the United States and for \$3.7 billion to exhaustively tackle the escalating humanitarian situation at the U.S. Southwest border. *See* Letter from the President, *supra*; *see also* Siobhan Hughes, *House Clears \$225 Million in Funding for Israel's Iron Dome Defense System*, WALL ST. J. (Aug. 1, 2014, 10:24 PM), <http://www.wsj.com/articles/senate-approves-225-million-in-funding-for-israels-iron-dome-defense-system-1406913423> (noting Obama's total request for emergency supplemental appropriations for border and wildfires). Sources indicate the administration asked for \$225 million separately from Obama's initial request for wildfire and border patrol financial assistance. *See* Hughes, *supra*.

Dome to \$923.3 million since FY2011.⁶¹ For FY2015, the U.S. MDA requested \$175.97 million for the Iron Dome, and if projected amounts were approved, the total funding for the Iron Dome, including FY2015, would reach \$1.28 billion.⁶²

3. Jerusalem

Today, Israeli leaders continue to claim all of Jerusalem as the capital of Israel, following an official declaration in 1980.⁶³ Since 1967, twelve Israeli settlements—housing over 190,000 Jewish settlers—have been built on contested land in East Jerusalem.⁶⁴ Military occupation of the West Bank, including East Jerusalem, resulted in an estimated 500,000 Israelis living in residential neighborhoods or settlements that are of disputed legality according to international legal standards.⁶⁵ Since the Israeli proclamation that Jerusalem is its capital despite international decrees—including Resolution 181 that states Jerusalem shall remain an international zone—United States presidents challenge Israel’s claim to the city, as well as the existence of East Jerusalem settlements.⁶⁶ As recently as March 2013, President Obama stated, “Israelis

61. See Sharp, *supra* note 51. In March 2014, a coproduction agreement ensured that Raytheon, a U.S.-based weapons manufacturer, produce components for the expanding Israeli Iron Dome system. *Id.* at 10. On September 30, 2014, Raytheon received a \$149 million contract to provide particular parts for the Iron Dome system. *See id.*

62. *See id.* Sharp noted that over the years, Congress has consistently approved funding for joint U.S.-Israeli missile defense cooperation in excess of initial requests. *Id.* Certain restrictions, however, were placed on additional Israeli defense funding for FY2015 following especially violent eruptions in 2014. *See* H.R. REP. NO. 113-211, sec. 8069, at 236 (2014).

63. See Ehab Zahriyeh, *Who Owns Jerusalem?*, AL JAZEERA AM. (Oct. 30, 2014, 10:51 AM), <http://america.aljazeera.com/articles/2014/10/30/jerusalem-statusinternationalregime.html> [http://perma.cc/F5WF-T23A].

64. *See id.* (describing modern Israeli occupation of Jerusalem); *see also* Keren Greenblatt, “Gate of the Sun”: Applying Human Rights Law in the Occupied Palestinian Territories in Light of Non-Violent Resistance and Normalization, 12 NW. J. INT’L HUM. RTS. 152, 162 (2014) (noting Israel officially annexed East Jerusalem in 1980, when Basic Law adopted). Basic Law is similar to that of a constitutional provision, although Israel has no constitution. *See* Greenblatt, *supra*, at 162 n.89; *see also* Ruth Lapidoth, *Jerusalem – Some Jurisprudential Aspects*, 45 CATH. U. L. REV. 661, 670 (1996) (describing first year Jerusalem declared capital of Israel). The Knesset, or Parliament of Israel, passed the Basic Law in 1980, which states: “Jerusalem, complete and united, is the capital of Israel,” and it is “the seat of the President of the State, the Knesset, the Government, and the Supreme Court.” Lapidoth, *supra*, at 670. Basic Law says that Holy Places in Jerusalem shall be protected and that the Israeli government must provide for development and prosperity of Jerusalem. *See id.*

65. ZANOTTI, *supra* note 44, at summary.

66. *See* Lapidoth, *supra* note 64, at 670 (describing United Nations Security Council’s reaction to Israeli proclamation). In 1982, President Ronald Reagan declared, as part of his peace initiative, that negotiations between Israelis and Palestinians should determine the status of an undivided Jerusalem. *See id.*; *see also* ZANOTTI, *supra* note 44, at 48-49 (describing various United States presidents’ policies behind settlements in Jerusalem). Before Reagan’s peace initiative, in 1980, President Carter’s administration opined that the Israeli settlements in Jerusalem were illegal. *See* ZANOTTI, *supra* note 44, at 48. While Reagan did not declare the settlements illegal, he did state they were ill-advised and unnecessarily provocative. *See id.* Since Reagan’s comments, presidents have refused to make pronouncements on the legality of settlements. *See id.* Loan

must recognize that continued settlement activity is counterproductive to the cause of peace.”⁶⁷

C. *United States and Israel: The Recognition Power*

1. *Limits*

Since 1937, the Supreme Court has interpreted the U.S. Constitution to grant Executive authority to recognize a foreign state or government.⁶⁸ Many scholars argue that this power derives primarily from constitutional text: the Reception Clause, also called the Recognition Clause, found in Article II.⁶⁹ Early Supreme Court cases did not immediately assign plenary recognition power to the Executive but rather acknowledged the Judiciary could not independently decide the legitimacy of a new state or government.⁷⁰ Yet, by 1839, in *Williams v. Suffolk Insurance Co.*,⁷¹ the Supreme Court stated recognition of a foreign state or nation was an executive power to which the Judiciary must yield.⁷² *Williams* called direct attention to the strength of the Executive, compared to the Judiciary, in leading foreign relations responsibilities.⁷³

More specifically, in 1852, in *Kennett v. Chambers*,⁷⁴ the Supreme Court reiterated the importance of the recognition power during the territorial dispute between Mexico and Texas.⁷⁵ The plaintiff, a United States citizen, asked the Court to enforce a contract created in Texas before the United States

guarantees to Israel from the U.S., however, are subject to possible reduction by the total Israel spends on settlements in occupied territories, yet the most recent reduction was during FY2005. *See id.* at 47.

67. Erin Delmore, *Obama to Young Israelis: ‘You Are Not Alone,’* MSNBC, <http://tv.msnbc.com/2013/03/21/watch-live-president-obama-speaks-to-israelis/> (updated Sept. 12, 2013, 9:02 AM) [<http://perma.cc/ST64-MRHD>] (see video at 39:27) (capturing President Obama’s spring 2013 address to Israeli people).

68. *See* Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. RICH. L. REV. 801, 802 (2011). In *United States v. Belmont*, 301 U.S. 324, 330 (1937), the Court stated, “[T]hat . . . negotiations, acceptance of the assignment and agreements and understandings in respect [to diplomatic relations] were within the competence of the President . . . the Executive had authority to speak as the sole organ of that government.” *Id.* at 802 n.5; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 (AM. LAW INST. 1987).

69. *See* Reinstein, *supra* note 68, at 812. Alexander Hamilton was one of the earliest figures to argue an executive recognition power exists, writing as *Pacifus*, in 1793. *See id.* at 812 n.68.

70. *See* *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634 (1818) (stating recognition should belong to those “who can declare what the law shall be”). This does not include the Judiciary. *See id.* (“[T]he courts . . . must view . . . new[] government as . . . viewed by the [U.S.] legislative and executive departments”); *see also* *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 324 (1818); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 272 (1808) (citing U.S. Judiciary’s inability to decide legitimacy of independent St. Domingo); *Kennett v. Chambers*, 55 U.S. (14 How.) 38, 50-51 (1852) (indicating U.S. government branch exclusively charged with foreign relations should decide Texas independence, not Judiciary).

71. 38 U.S. (13 Pet.) 415 (1839).

72. *Id.* at 420.

73. *See* Reinstein, *supra* note 68, at 862 n.27.

74. 55 U.S. (14 How.) 38 (1852).

75. *See id.* at 44, 49-51 (reasoning petitioner’s contract valid in Texas remains illegal and void).

acknowledged the independence of this territory from Mexico.⁷⁶ The Supreme Court held enforcement was beyond the Court's jurisdiction because political branches of government exclusively control the intercourse of the United States with foreign nations.⁷⁷ The Court set early precedent stating the Judiciary is incompetent in resolving international disputes or dictating foreign policy outcomes.⁷⁸ Still, later cases challenged the idea of the President's plenary recognition power as the Supreme Court, even in more modern decisions, acknowledged the executive and legislative branches may share recognition power.⁷⁹

2. Application

Presidents' modern application of the recognition power has elevated the authority, sometimes read as limited, to a level that suggests the recognition power is almost an absolute executive public policy tool.⁸⁰ In *United States v. Belmont*,⁸¹ the Judiciary explicitly acknowledged President Franklin D. Roosevelt's exclusive ability to form international compacts with the Soviet Union, a matter of national policy that trumped any New York state policy.⁸² The Court said that to allow the reexamination and criticism of acts of one sovereign by the courts of another would endanger friendly and peaceful relations between governments.⁸³ In 1942, *United States v. Pink*⁸⁴ demonstrated the Supreme Court's deference to the President's use of the recognition power as a tool of public policy regarding the Soviet Union.⁸⁵ In

76. See *id.* at 45-46.

77. See *id.* at 49-51 (recognizing constitutional mandate prohibiting judiciary from tinkering with foreign policy).

78. See *Kennett*, 55 U.S. (14 How.) at 49-51 (describing government's power to recognize states and judiciary's need to comply with such findings).

79. See *Jones v. United States*, 137 U.S. 202, 212 (1890) (stating legislative and executive branches determine sovereign of nation); see also *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (relaying sovereignty of foreign relations not subject to judicial decision). But see *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012) (stating possibility of executive branch possessing only power to recognize foreign sovereigns); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) (noting political recognition exclusively function of Executive).

80. See Eric T. Smith, Comment, *State Recognition Under the Foreign Sovereign Immunity Act: Who Decides, the Judiciary or the Executive?*, 6 TEMP. INT'L & COMP. L.J. 169, 177 (1992); see also Reinstein, *supra* note 68, at 803 (calling recognition power significant tool, which increases Executive power, in executive branch's foreign policy arsenal).

81. 301 U.S. 324 (1937).

82. See *id.* at 327, 330 (deferring to President's recognition of Soviet government, validating all subsequent Soviet acts for U.S.).

83. See *id.* at 328. The Court delineates the immediate effects of the President's recognition of the Soviet government: "[t]he recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between two governments." *Id.* at 330.

84. 315 U.S. 203, 229 (1942).

85. See *id.* The Judiciary wrote, "The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with

1955, the Supreme Court stated that the Executive held the authority to decide the status of the communist People's Republic of China (PRC), following Truman's refusal to recognize the PRC in 1948.⁸⁶

More recently, in 1979, President Carter pushed the Court's perspective on the recognition power in *Goldwater v. Carter*.⁸⁷ In *Goldwater*, the Court refused to settle a dispute between President Carter and the Senate.⁸⁸ The Senate brought suit after Carter unilaterally announced the United States would end the Mutual Defense Treaty of 1954 with the PRC without the Senate's expected two-thirds vote.⁸⁹ In defending President Carter's actions, the Carter Administration specifically cited the recognition power as a public policy tool allowing a unilateral decree that the United States recognized the PRC as a nation.⁹⁰ The unilateral decree conflicted with the Senate-approved policy that, instead, the only legitimate nation was the democratic island of Taiwan.⁹¹

3. Zivotofsky

The parents of Menachem Zivotofsky filed suit against the United States Secretary of State in September of 2003, alleging the Secretary of State breached a duty owed to Menachem, which Section 214(d) of the FRAA mandated.⁹² Under the Act, Zivotofsky's parents requested that the Secretary of State list Jerusalem, Israel, as Menachem's place of birth on his passport, but the State Department denied the requests.⁹³ As a result, Menachem's issued passport lists his birthplace only as Jerusalem.⁹⁴ After hearing the case, the

respect to the Russian nationalization decrees." *Id.*

86. *Nat'l City Bank of N.Y. v. China*, 348 U.S. 356, 358 (1955) (describing question of PRC's sovereignty as outside competence of Court, but within executive power).

87. 444 U.S. 996, 996-97 (1979) (holding case not ripe for review). *But see id.* at 1006 (Brennan, J., dissenting) (explaining Carter's power to terminate stems from president's well-settled power to recognize foreign sovereign nations).

88. *See Goldwater*, 444 U.S. at 1006.

89. *See* Guy M. Miller, Note, *Treaty Termination Under the United States Constitution: Reassessing the Legacy of Goldwater v. Carter*, 27 N.Y.U. J. INT'L L. & POL. 859, 861-62 (1995). Jimmy Carter announced that the United States would terminate the treaty on December 23, 1978, and Arizona Senator Barry Goldwater then filed suit against the President in Washington, D.C. *See id.* at 556.

90. *See id.*

91. *Goldwater*, 444 U.S. at 1006-07 (Brennan, J., dissenting); *see also* Miller, *supra* note 89, at 872-73. In addition, even just twenty-one years ago, in 1994, President Clinton used the executive recognition power to defend his actions in deploying United States troops to Haiti. *See* H. Jefferson Powell, *The President's Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 570 (1999). Powell argues the Constitution provides the executive branch, or more specifically, the president, with extensive power to shape an appropriately effective recognition tool to tackle the extremely complex, thorny issues omnipresent in the realm of foreign relations. *See id.* at 556.

92. *See Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, No. 03-1921, 03-2048, 2004 WL 5835212 at *1, *1-2 (D.D.C. Sept. 7, 2004). Menachem's parents are United States citizens, raising their family in Jerusalem, and Menachem was born shortly after the President of the United States signed Section 214(d) into law. *See id.* at *1.

93. *See Zivotofsky*, 2004 WL 5835212 at *1.

94. *See id.* In filing suit, the Zivotofskys sought a declaratory judgment against the United States

United States District Court for the District of Columbia granted the Secretary of State's motion to dismiss because the court agreed the Zivotofskys did not suffer an injury in fact and lacked standing.⁹⁵ The district court also concluded Zivotofsky's issue created a nonjusticiable political question, and, therefore, the issue was outside the court's jurisdiction.⁹⁶ In reaching this decision, the federal court noted that past cases made it clear that the Executive holds the power to recognize sovereigns, as the Constitution delineates, and the issue at bar required such a recognition power.⁹⁷

The Zivotofskys appealed the decision, and the United States Court of Appeals for the District of Columbia Circuit reversed on the first issue of standing.⁹⁸ The court held the Zivotofskys had standing through an individual right created by Congress to list Israel as Menachem's birthplace on his passport and consular report of birth abroad.⁹⁹ The court of appeals also remanded the case for the district court to decide whether Section 214(d) is a

Secretary of State. *See id.* at *2. The Zivotofskys also asked the court to order an injunction against the Secretary of State to create a Consular Report of Birth Abroad with Jerusalem, Israel, listed as Menachem's place of birth. *See id.* Further, Menachem's parents sought a passport specifying Menachem's birthplace as Jerusalem, Israel, and an order to the Secretary of State to command consular staff at United States embassies and consulates to obey the terms of Section 214(d). *See id.*

95. *See id.* (holding plaintiffs lack Article III standing). The court noted, in order to establish standing, Zivotofsky must show an injury traceable to the challenged act, which a ruling in favor of Zivotofsky would likely remedy. *See id.* The court sided with the Secretary of State's argument that Zivotofsky's alleged injury—an inability to obtain a stated benefit and a denial of a statutory right outlined and mandated by Section 214(d)—was not persuasive. *See id.*

96. *See id.* at *3-4. The court cited *Baker v. Carr*, 369 U.S. 186 (1962), to decide that when cases present a political question, the Constitution says federal courts lack Article III jurisdiction. *See Zivotofsky*, 2004 WL 5835212, at *4. The court reasoned a sound argument based on the text of the Constitution delegates the question to a political department, the executive or legislative branch. *See id.*

97. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, No. 03-1921, 03-2048, 2004 WL 5835212 at *1, *4 (D.D.C. Sept. 7, 2004) (rejecting Zivotofsky's argument before court as administrative passport policy, not recognition of sovereigns). The court cites support for plenary recognition power in the executive branch through the following cases: *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979); *United States v. Arlington, Va.*, 669 F.2d 925, 929 (4th Cir. 1982) (empowering President to recognize government of foreign state); *Ams. United for Separation of Church and State v. Reagan*, 786 F.2d 194, 202 (3d Cir. 1986) (acknowledging Constitution exclusively commits recognition of sovereigns power to Executive). *Zivotofsky*, 2004 WL 5835212 at *4.

98. *See Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1230 (D.C. Cir. 2009), *vacated and remanded sub nom. Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (recounting history of case); *see also Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 444 F.3d 614, 619 (D.C. Cir. 2006) (holding Zivotofsky has standing because relevant issue not whether Zivotofsky can use passport).

99. *See Zivotofsky ex rel. Ari. Z. v. Sec'y of State*, 444 F.3d 614, 619 (D.C. Cir. 2006). A consular report of birth abroad is different from a passport and includes the applicant's name, sex, place of birth, date of birth, and parents. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2110-11, (2015) (Thomas, J., concurring in part and dissenting in part). The consular report of birth abroad is proof of official acknowledgement of citizenship of a child born abroad. *See* 22 C.F.R. § 51.43 (2008). For the purposes of argument in court, Zivotofsky waived any argument that his consular report of birth abroad should be differentiated from his passport and an analysis of the validity of the consular report as opposed to Zivotofsky's passport is not provided. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083 (2015).

mandatory or advisory statute, among other instructions.¹⁰⁰

On remand, the district court granted the Secretary of State's motion to dismiss for lack of subject matter jurisdiction because the court held, again, that the complaint asserted a claim that infringed upon the President's recognition power.¹⁰¹ Zivotofsky appealed the dismissal once more, and the Court of Appeals for the District of Columbia Circuit reviewed the issue *de novo*: whether the courts may grant Zivotofsky relief, or whether Zivotofsky must look for remedy elsewhere.¹⁰² Despite Zivotofsky's additional attempts to challenge the district court's holding, the court of appeals affirmed its decision, concluding Zivotofsky's complaint raised a nonjusticiable political question and the dismissal for lack of subject matter jurisdiction was proper.¹⁰³

Following the court of appeals' dismissal, Zivotofsky's parents petitioned for writ of certiorari to the Supreme Court, which was granted in May 2011.¹⁰⁴ By March 26, 2012, Chief Justice Roberts reversed the court of appeals' opinion, stating courts are capable of determining whether the FRAA can be applied to the set of facts at bar, or whether the statute at issue is instead unconstitutional.¹⁰⁵ Chief Justice Roberts corrected the district court and court of appeals in their misunderstanding of the case's central issue: *Zivotofsky* did

100. See *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1230 (D.C. Cir. 2009), *vacated and remanded sub nom. Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012). The Court notes that, on remand, it also asked the district court to develop a more complete record of the case and consider the implications of Zivotofsky's passport request—that his consular report of birth and passport say Israel is his place of birth instead of Jerusalem, Israel—made in his motion for summary judgment. See *id.*

101. See *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 511 F. Supp. 2d 97, 102 (D.D.C. 2007) (explaining issue when raising model political question not appropriately settled by Judiciary), *aff'd sub nom. Zivotofsky v. Sec'y of State*, 571 F.3d 1227 (D.C. Cir. 2009), *vacated and remanded sub nom., Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), *aff'd on other grounds*, 725 F.3d 197 (D.C. Cir. 2013); see also *Zivotofsky*, 571 F.3d at 1230.

102. See *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1230 (D.D.C. 2009) (describing main issue for court to decide), *vacated and remanded sub nom. Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

103. See *id.* at 1233 (granting motion to dismiss). In reaching its conclusion, the court relied upon various texts that construe the recognition power as solely, or plenary, in the President, including Art. II, § 3 of the Constitution, which states the President shall “receive Ambassadors and other public Ministers.” *Id.* at 1231. The court also cited expert arguments by Louis Henkin, author of *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 38 (2d ed. 1996), as well as Saikrishna B. Prakash and Michael D. Ramsey, authors of the Yale Law Journal Article, *The Executive Power over Foreign Affairs*. *Id.* The court quotes Prakash and Ramsay: “Congress never dictated [to President George Washington] which countries or governments to recognize because it understood that the Constitution shifted the recognition power from Congress to the President.” *Id.* Finally, the court of appeals cited to multiple Supreme Court cases over numerous years recognizing recognition power exclusively in the President through *Banco Nacional de Cuba v. Sabbatino*, *Goldwater v. Carter*, and *United States v. Pink*. *Zivotofsky*, 571 F.3d at 1231. The court noted that the President has the power to shield the United States from entering any debate about Israel's sovereignty over Jerusalem. See *id.* at 1231.

104. See *M.B.Z. ex rel. Zivotofsky v. Clinton*, 131 S. Ct. 2897 (mem.) (2011) (granting certiorari to plaintiff). In granting certiorari, the Court also directed the parties to brief and argue whether 214(d) of the FRAA unlawfully encroaches on the President's recognition power. See *id.*

105. See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1425 (2012).

not ask the courts to decide whether Israel controlled Jerusalem, but rather, the case asks whether the Zivotofsky family may exercise a statutory right under Section 214(d).¹⁰⁶

The Supreme Court reversed the lower court's ruling on the threshold question and remanded the case for further proceedings to consider the merits of Zivotofsky's case.¹⁰⁷ In accordance with the Supreme Court's instruction, the United States Court of Appeals for the District of Columbia Circuit considered the new central issue of the Zivotofsky family's appeal and held Section 214(d) *does* infringe upon the President's exclusive recognition power and is unconstitutional.¹⁰⁸ The holding did not deter Zivotofsky's parents, however, and they again petitioned for writ of certiorari, which the Supreme Court granted on April 21, 2014.¹⁰⁹ After hearing oral arguments on November 3, 2014, Justice Kennedy delivered the opinion of the Court on June 8, 2015, which held the President has the exclusive power to recognize a foreign sovereign and Section 214(d) is unconstitutional.¹¹⁰ As a result, Zivotofsky's parents may not demand that their son's U.S. passport display that he was born in Jerusalem, Israel, as Congress once suggested was Zivotofsky's right.¹¹¹

106. *See id.* at 1427. The Court clarifies that through this issue, federal courts are not asked to create, or even put aside, foreign policy decisions regarding previous statements surrounding the validity of Israel's control over Jerusalem; instead, the federal courts are asked to decide whether or not Zivotofsky's understanding of the statute is on point, and whether the statute is constitutional—a decision of which the courts are most certainly capable of making. *See id.* Further, citing *Marbury v. Madison* and *INS v. Chada*, the Supreme Court stated courts cannot avoid the responsibility of interpreting the law because a matter has a political implication. *See id.* at 1428.

107. *See id.* at 1431 (vacating judgment of court of appeals and remanding for further proceedings consistent with opinion). The Court further stated the court of appeals should consider Zivotofsky's claim on the merits, as was not done previously. *See id.*

108. *See Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 200 (D.C. Cir. 2013) (holding 214(d)'s provision unconstitutional), *cert. granted sub nom.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 134 S. Ct. 1873 (2014), *aff'd sub nom.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). The court supported its holding, reasoning the status of Jerusalem, as a city in the nation of Israel, is one of the most sensitive and provocative issues in history. *See id.* The court also acknowledged that the controversy between the Palestinian and Israeli people is far from settled, as both groups continue to claim sovereignty over the city. *See id.* The court also recognized that the State Department's Foreign Affairs Manual (FAM) instructs administrators on what to do if an applicant is born in a disputed territory: record only the city or area of birth instead of the country. *See id.* at 201. The court noted the executive branch consistently held a policy of neutrality and held passport holders by way of congressionally-made statutes may not alter that policy through political statement. *See id.* at 225-26 (Tatel, C.J., concurring). Further, in a concurring opinion Circuit Judge Tatel stated that Americans born in Jerusalem do not have the right to use an official United States-granted document such as a passport to make such a political statement. *See id.* at 226.

109. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 134 S. Ct. 1873 (2014) (mem.) (granting petition for writ of certiorari). The Supreme Court heard oral arguments for and against the issue on November 3, 2014. *See Transcript of Oral Argument, Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (No. 13-628), http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-628_fe9g.pdf [<http://perma.cc/PWR8-32Y4>].

110. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015).

111. *See Zivotofsky*, 135 S. Ct. at 2083, 2096.

III. ANALYSIS

Zivotofsky's procedural history is complex.¹¹² *Zivotofsky's* case was active in some form for over ten years via remands, dismissals, and appeals in the federal system, and multiple courts deflected a ruling in stating the case created a nonjusticiable political question.¹¹³ The long case history is not surprising as the *Zivotofskys* requested an answer to a sensitive question: may the *Zivotofskys* imply that Jerusalem is under lawful Israeli control by way of an official U.S. document?¹¹⁴ The territorial dispute behind *Zivotofsky* is a globally polarizing issue worthy of U.N. dialogue for almost three-quarters of a century.¹¹⁵ Even without considering the existence of a recognition power, the Judiciary would have been bold to hold in the *Zivotofskys'* favor because the 2013 federal court of appeals directly stated the case's implications: by deeming the FRAA constitutional regardless of the *Zivotofskys'* intent, the Court would have made an obvious global, political statement by enabling the *Zivotofskys*, and Congress, to declare Jerusalem a city in Israel.¹¹⁶

Fortunately for the Judiciary, prior case law supports the premise that the recognition power, at least as between the Judiciary and the Executive, lies within the Executive.¹¹⁷ Further, as between the executive and legislative branches, Supreme Court acknowledgement that perhaps the recognition power may be *shared* in certain circumstances still does not amount to a *Zivotofsky*-friendly ruling because the executive branch has expressly stated that Jerusalem is not a territory of Israel.¹¹⁸ Since before the establishment of Israel, the Supreme Court acknowledged the validity of the President's superior claim to

112. See *supra* Part II.C.3 (describing various judicial forms of *Zivotofsky's* issue upon moving through federal system).

113. See *id.*; see also *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2081 (2015) (opining sensitive nature of Jerusalem's political standing). In the *Zivotofsky* opinion, the Supreme Court stated the central question of the case cuts to one of the most sensitive matters of contemporary global affairs. See 135 S. Ct. at 2081.

114. See *Zivotofsky*, 135 S. Ct. at 2094 (stating 214(d) requirement). The Court accepts that 214(d) does require the President to acknowledge that an individual was born in Israel, when that same individual, under foreign policy, actually was not. *But see Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (highlighting question decided only if petitioner may exercise statutory right); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2118 (2015) (Scalia, J., dissenting) (stating 214(d) entirely unrelated to recognizing sovereignty of Jerusalem).

115. See *supra* Parts II.A.1-2 & II.B.3 (discussing Israel's territorial divide and current dispute over control of Jerusalem).

116. See *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 226 (D.C. Cir. 2013) (ruling exercising 214(d)'s provision makes political statement) *cert. granted sub nom.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 134 S. Ct. 1873 (2014), *aff'd sub nom.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

117. See *supra* Part II.C.1 (relaying history of Supreme Court decision holding recognition power not Judiciary tool).

118. Compare *supra* Part II.C.1 (discussing executive-legislative relationship in recognition power context), with *supra* Part II.B.3 (describing presidents' refusal to acknowledge legitimate Israeli control of Jerusalem).

the recognition power over Congress in foreign policy matters.¹¹⁹

In the Israeli-Palestinian conflict, the Court may rely on *Kennett v. Chambers* for a textual backing of the existence and reach of the recognition power.¹²⁰ The 1852 *Kennett* case is analogous to the U.S. foreign policy dilemma in *Zivotofsky*.¹²¹ Thus, as between the three branches of government, the Judiciary may not recognize any nation without the blessing of the executive and legislative—the political—branches of government.¹²² The Supreme Court's ruling in a similar territorial dispute, one between Texas and Mexico, over 150 years ago, supports the Supreme Court's pause in reasoning in *Zivotofsky* that the Judiciary cannot exercise the recognition power, especially in creating a default ruling over the status of modern-day Jerusalem.¹²³

Still, in *Kennett*, the Judiciary did not address the ultimate question of who holds the recognition power as between the executive or legislative branches.¹²⁴ Even in suggesting a shared power through *Kennett*, modern application of the recognition power in presidential foreign policy practice provides a safe answer for the Court in *Zivotofsky*.¹²⁵ Starting in 1937 the Court has repeatedly and explicitly suggested that the Executive may at least attempt to exercise the recognition power first and foremost, even if at odds with the legislative branch.¹²⁶ Further, H. Jefferson Powell's statement that the Constitution defers to the President in the realm of delicate foreign relation problems fits squarely within the complicated nature of the Israeli-Palestinian territorial conflict.¹²⁷ For the United States to remain nimble on such a thorny issue, the Court's reading of the recognition power as exclusive to the President is shrewd

119. See *supra* notes 67-68 and accompanying text (citing early arguments for executive power and inadequacy of other branches to conduct foreign policy).

120. See 55 U.S. (14 How.) 38, 44 (1852) (noting recognizing new government belongs exclusively to political branches of government).

121. Compare 55 U.S. (14 How.) 38, 52 (1852) (describing central issue contract enforcement in contravention to U.S. foreign policy), with *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2081 (2015) (describing central issue passport issuance in contravention to U.S. foreign policy).

122. See 55 U.S. (14 How.) 38, 44 (1852) (political department recognizes foreign country, not Judiciary); *Zivotofsky*, 135 S. Ct. at 2081 (matters of international affairs are not for the Judiciary, but the Legislature and Executive).

123. See *Kennett*, 55 U.S. (14 How.) at 50-51 (stating Judiciary unfit to rule on question of sovereignty without political branch support); see also *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015) (stating nation must speak with one voice of President on issue of recognition).

124. See *Kennett*, 55 U.S. (14 How.) at 50 (referring to department of government but not specifically to either Legislative or Executive).

125. See *supra* Part II.C.2 (discussing Executive's modern use of recognition power).

126. See *Goldwater v. Carter*, 444 U.S. 996, 996-97 (1979) (deferring to modern use of President's recognition authority often over Legislature); *Nat'l City Bank of N.Y. v. China*, 348 U.S. 356, 358 (1955) (describing status of Republic of China as matter for Executive); *United States v. Pink*, 315 U.S. 203, 229 (1942) (noting President may conduct foreign relations without consent of Senate); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (explaining President's competency must not be doubted in realm of foreign affairs).

127. See Powell, *supra* note 91 and accompanying text (describing premise that President must hold power for foreign policy flexibility).

because in holding the FRAA unconstitutional, the Court frees the President, a singular voice, from the quicksand of legislative statutes that might otherwise stagnate foreign policy.¹²⁸

In choosing to honor the President's voiced neutrality policy over the FRAA, the Court does *not* condemn the legislative branch to obscurity because Congress may exercise foreign policy in other ways, especially through the allocation of the U.S. budget, and the Court admits this truth in its 2015 decision.¹²⁹ The Supreme Court, however, refused to expressly state that Congress garners *extraordinary* power in international diplomacy today, more than ever, because the Legislature continues to hold the power of the purse, particularly during wartime.¹³⁰ As the Palestinian-Israeli dispute has evolved, Congress has continually rushed to Israel's aid by passing budgetary provisions with significant military funding specifically tailored to Israel's needs in defending against Palestinian attacks.¹³¹

The Consolidated Appropriations Act of 2014 provides \$3.1 billion as grants only for Israel's use and allows for \$815.3 million available specifically for Israeli defense articles and services, including research and development.¹³² Additionally, the Act requires that no funds appropriated under Titles II through VI of the Act shall provide support to a Palestinian State, unless the governing entity of a new Palestinian State demonstrates commitment to peaceful coexistence with Israel.¹³³ Further, during a March 2013 visit to Israel, President Obama expressly acknowledged that continued military support for Israel is subject to the approval of Congress.¹³⁴ Thus, Congress, even without claiming a recognition power, and not the President, acts as the central force in shaping U.S. policy regarding the Israeli-Palestinian territorial dispute through the remarkable provision of weapons.¹³⁵

The legislative branch possesses force beyond the Executive in recognizing Israel's sovereignty over Jerusalem, despite the Supreme Court's attempt to

128. See *supra* Part II.B.3 (discussing modern, conflicting political view surrounding status of Jerusalem); see also *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) (holding recognition power rests only with Executive).

129. See *supra* Part II.B.2 (discussing modern funding budgeted to Israel); see also *Zivotofsky*, 135 S. Ct. at 2088 (stating Congress has important influence over "other aspects" of foreign policy, but not recognition).

130. See *Zivotofsky*, 135 S. Ct. at 2076-2126 (2015) (omitting any direct reference to military funding); see also *supra* notes 37-38 and accompanying text (contrasting Truman's staunch vocal support for Israeli fortification with lack of actual U.S. military funding).

131. See *supra* Part II.B.2 (stating modern budgetary provisions for Israel repeatedly put forth by Congress).

132. See Consolidated Appropriations Act, 128 Stat. at 122 (setting forth funds Congress appropriated to President for Israeli specific purpose).

133. See *id.* § 7036(a)(1)(A) (stating limits on United States support of Palestine).

134. See SHARP, *supra* note 13, at summary (stating continued support in form of military aid). For FY2015, the Executive's request for Israeli FMF amounted to approximately 53% of total FMF funding worldwide. See *id.* at 5.

135. See SHARP, *supra* note 13, at summary (noting support for Israel subject to congressional approval).

tiptoe around the harsh reality.¹³⁶ The legislative branch appropriated \$235.3 million of the FY2014 U.S. budget to Israel to procure the Iron Dome defense system that combats Palestinian short-range rockets.¹³⁷ Additionally, as FY2014 ended, Congress passed the Emergency Supplemental Appropriations Resolution, providing an immediate, additional \$225 million to Israel to support the Iron Dome system.¹³⁸ Yet the highly effective and expensive Iron Dome is protecting Jerusalem, an area that neither the U.N., nor the modern executive branch, has affirmatively deemed under rightful Israeli control.¹³⁹

Resolution 181, which the U.N. approved in 1947, provided that once the British Mandate lifted in Palestine, Jerusalem would remain a special international regime, controlled by no particular nation.¹⁴⁰ Furthermore, the resolution proposed that 55% of British-controlled territory would become Israel and 45% would remain Palestinian.¹⁴¹ While many wars shifted control of Jerusalem in the past, today, Israel continues to claim Jerusalem as its rightful capital, and East Jerusalem alone hosts hundreds of thousands of Israeli settlements of questionable international legality.¹⁴² Israeli Basic Law further provides that Jerusalem will prosper as Israel's rightful capital.¹⁴³ The Iron Dome, through U.S. legislative funding, provides daily protection for Israeli citizens and settlements.¹⁴⁴

President Truman's political lobby for Israel following World War II, despite opposition in the United States, was met by minimal budgetary support from Congress.¹⁴⁵ At the same time, Truman's polarizing opinion was loud but forceful over British leaders, and unfortunately, warring Arab nations erupted after the establishment of Israel, fulfilling predictions from the SWNCC and Congress.¹⁴⁶ Today almost the opposite is true: the Executive has refused to endorse vocally one nation over another in the ongoing Arab-Israeli territorial dispute, yet Congress requests, and the Executive approves, colossal monetary

136. Compare *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (lacking discussion citing extent of legislative support to Israel), with *supra* Part II.C.

137. Consolidated Appropriations Act, 128 Stat. at 122 (describing funding for Israeli Cooperative Programs necessitating Iron Dome procurement).

138. See *supra* text accompanying note 59 (citing Congress's provision to counter Palestinian threats to Israel).

139. See *supra* Parts II.B.2-3 (providing Iron Dome cost, functionality, and protection over territory, including Jerusalem).

140. See *supra* note 31 and accompanying text (asserting U.N.'s resolve for special international regime for city of Jerusalem).

141. See *supra* note 31 and accompanying text.

142. See *supra* note 64 and accompanying text (highlighting current Israeli control over Jerusalem).

143. See *supra* note 64 and accompanying text.

144. See *supra* Part II.B.2 (describing Iron Dome covered territory).

145. See *supra* notes 38-39 and accompanying text (describing lack of budgetary appropriation to Israel following independence).

146. See *supra* notes 26, 34 and accompanying text (highlighting Truman's support, Committee's warning, and resulting bloodshed).

support for the Israeli military.¹⁴⁷

The Supreme Court's decision in *Zivotofsky* fails to paint an accurate picture of the Executive's economic recognition of the status of Jerusalem and this failure, in turn, puts the Supreme Court in a duplicitous position.¹⁴⁸ The majority opinion writes that it is essential for the President alone to speak for the United States on the formal recognition of Jerusalem and that Congress may not infringe upon this exclusive power.¹⁴⁹ Yet, the President has demonstrated on multiple occasions that the Executive is anything but neutral regarding Jerusalem because the Executive continues to approve military appropriations to the Israeli army.¹⁵⁰ One forgets the Executive's policy of neutrality regarding Jerusalem among the Executive's biased actions supporting the Legislature's propensity for wartime funding, and thus it remains impossible to justify the Supreme Court's ruling that the Executive's recognition is, in reality, at odds with the drafting of Section 214(d).¹⁵¹

IV. CONCLUSION

In 2015, the holding that the recognition power is exclusive to the President in the context of the Israeli-Palestinian conflict, as the Supreme Court describes in *Zivotofsky*, means very little. United States funding undermines the President's express policy of neutrality because such funding directly flows to support Israel's formidable military edge. The United States consistently provides billions of dollars to Israel over neighboring nations to specifically protect Israeli society, despite international legal questions of Israel's territorial legitimacy. Against this contemporary backdrop, the Judiciary's ruling that the FRAA is unconstitutional means nothing in the modern foreign policy realm because today, economic backing yields more power than a meritless political statement.

The struggle between the President's constitutional authority to recognize foreign legislature and Congress's power of the purse lifts the veil the President

147. Compare *supra* note 66 and accompanying text (describing push for neutrality from 1970 to today on territory dispute), with *supra* note 43 and accompanying text (calling out modern military funding increase to Israel).

148. See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015) (holding Congress cannot require Executive to contradict own statement regarding formal recognition). The Court goes on to assert that "Recognition is an act with immediate and powerful significance for international relations, so the President's position must be clear." *Id.* at 2090.

149. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087 (2015). The Court states: "If the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question." *Id.*

150. See *supra* Part II.A (highlighting substantial military funding to Israel).

151. Compare *supra* Part II.B.3 (describing Executive insistence on neutrality regarding Jerusalem), with *supra* Part II.B.1-2 (discussing U.S. economic support for Israel), and Foreign Relations Authorization Act, Pub. L. No. 107-228, § 214 (d), 116 Stat. 1350 (2003) (enabling passport holders to request the designation of Israel on official U.S. document).

attempts to hide behind in public statements regarding Israeli recognition. If Congress continues to fund Israeli military efforts as planned, the Executive's recognition power, at odds with the Legislature, is insignificant. Through this lens, the future of U.S. involvement in the Israeli-Palestinian conflict looks exceedingly controversial. Congressional monies shape America's currently one-sided stance. Funding provides for stronger results than any executive decree, and it is impossible for the international community not to take notice that the United States does anything but speak with one voice in recognizing Jerusalem's sovereignty.

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