

## ‘Jerusalem, Israel’ May Now Appear on Passports

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On Wednesday, President Donald Trump announced that the U.S. **formally recognizes** Jerusalem as Israel’s capital. This announcement exemplified a Supreme Court decision regarding recognition of sovereign entities, specifically, that such a power belongs solely to the president.

In the 2015 decision *Zivotofsky v. Kerry*, the Supreme Court ruled that Congress was unable to require the State Department to indicate in passports that Jerusalem is part of Israel. As of Wednesday, “Jerusalem, Israel” may now appear on passports.

James Madison wrote in *Federalist 42*, “If we are to be one nation in any respect it clearly ought to be in respect to other nations.”

The person embodying that singularity is the president.

The *Zivotofsky* case examined the constitutionality of Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003 (the “2003 Act”), in which Congress allowed American citizens born in Jerusalem to require that the State Department report as the citizen’s place of birth Israel instead of following State Department executive branch policy, which required reporting the individual’s place of birth as Jerusalem.

Menachem Zivotofsky was born in Jerusalem in 2002 to American parents working in Israel. As allowed under the 2003 Act, his parents asked the State Department to list Israel as his place of birth.

Although President George W. Bush had signed the 2003 Act, at the time of its signing, he issued a statement noting the executive branch would not enforce the provision, specifically, Section 214(d), allowing Americans born in Jerusalem to require that their passport show Israel as their country of birth. Bush’s position was in accordance with protocol, dating back to President Harry Truman’s administration: Jerusalem is disputed territory between the Israelis and the Palestinians.

Consequentially, the State Department denied the *Zivotofsky*’s request.

The *Zivotofskys* filed suit with the case eventually reaching the Supreme Court, which ruled in favor of the executive branch.

Chief Justice John Roberts stated in his dissent, “Never before has this Court accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs.” *Zivotofsky v. Kerry* presented not only constitutional issues regarding separation of powers, but also tested Madison’s philosophy on limitations to the exercise of authority and the different perspectives from which an issue should be considered.

Article Two, Section Three, Clause Four of the Constitution states that the President “shall receive all foreign Ambassadors and other public Ministers.” This clause of the Constitution, known as the Reception Clause, has been interpreted to provide the president with broad power over all matters of foreign policy by Congress, and to provide support for the president’s exclusive authority to grant recognition to a foreign sovereign.

The Constitution phrases the Reception Clause as a duty of the president instead of a power per se. The president has the authority to recognize territories abroad, and Israel is no exception to the rule. However, the fact that the Reception Clause is a duty and not an authority, like the authority of Congress to declare war, caused Madison to reflect on the relative importance of a provision in the Constitution that is not enumerated as a presidential power:

*“...although the executive may be a convenient organ of preliminary communications with foreign governments, on the subjects of treaty or war; and the proper agent for carrying into execution the final determinations of the competent authority yet it can have no pretensions from the nature of the powers in question compared with the nature of the executive trust, to that essential agency which gives validity to such determinations.”*

Madison’s nuanced, limited view of the president’s role seemed not to have been adopted by either the executive or judicial branches.

The complex political situation in the Middle East is reflected in the fact that although Truman recognized the State of Israel, Jerusalem has not been recognized by the executive branch as Israeli territory.

The high court made it clear that it was not involving itself in this political question and noted that in a prior case involving the Zivotofskys, *Zivotofsky v. Clinton*, it addressed the separation of powers issue, agreeing with the lower courts that while the Supreme Court could not adjudicate the political question of whether Jerusalem is part of Israel, **it could determine** “if the Zivotofsky’s interpretation of the statute is correct and whether the statute is constitutional.” Ignoring any Madisonian subtlety between duty and authority, the Supreme Court framed its analysis in terms of presidential power and saw no role for Congress in the matter. Thus, it ruled Section 214(d) as unconstitutional.

In his opinion, Justice Anthony Kennedy wrote that the legislative branch may not interfere with the president on certain matters.

*“Congress...has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation. Because these specific Clauses confer the recognition power on the President, the Court need not consider whether or to what extent the Vesting Clause, which*

*provides that the 'executive Power' shall be vested in the President, provides further support for the President's action here."*

Kennedy added that "the exclusive recognition power is essential to the conduct of Presidential duties. The formal act of recognition is an executive power that Congress may not qualify." National Public Radio's Nina Totenberg **wrote**, "The Zivotofskys counter that the founders of the nation did not intend to give the president an exclusive role in recognizing foreign nations." However, **Kennedy wrote**, "The President's exclusive recognition power encompasses the authority to acknowledge, in a formal sense, the legitimacy of other states and governments, including their territorial bounds." While Congress may play a role in foreign affairs, only the executive branch dictates foreign policy. *Zivotofsky v. Kerry* is evidence of how almost all nine justices interpreted the Constitution in an originalist fashion.

While much thought is given in Madison's writings to the avoidance of tyranny through the will of the people and checks and balances within the government, there appears to be little or almost no checks and balances in relation to the executive branch making certain foreign policy decisions.

Indeed, this appears to be one arena in which there is a strict view of the separation of powers. In *Federalist 39*, Madison defines a republic as a government deriving its powers from the citizens and administered by those holding office for a term.

In *Federalist 47*, Madison wrote, "In order to form correct ideas on this important subject, it will be proper to investigate the sense...that the three great departments of power should be separate and distinct." The power to set the foreign policy agenda is delegated solely to the executive branch.

Justice Clarence Thomas **wrote in his opinion of the case**, "[The] President is not constitutionally compelled to implement [the statute relating to Jerusalem] as it applies to passports because passport regulation falls squarely within his residual foreign affairs powers and Zivotofsky has identified no source of congressional power to require the President to list Israel as the place of birth for a citizen born in Jerusalem on that citizen's passport." University of San Diego Law School professor Michael Ramsey **wrote that Thomas' dissent is correct** and that the recognition of foreign entities is solely an executive function. "If Congress lacks an enumerated power to pass a statute, the president need not follow it, regardless of whether it infringes an exclusive presidential power," Ramsey said. "Congress has no textual power specifically over passports."

Although perhaps not within the bounds of this decision, Madison did recognize that in the power of the purse, Congress could affect the exercise of duties relegated to the executive. Historian David Stewart wrote, "If all lawmaking includes the House, then what of treaty-created law, which the House never touches?"

He continued, "Jefferson insisted that the House actually could reject a treaty, but Madison chose a more modest position: that the House could decline to adopt measures needed to implement a treaty."

Perhaps in this situation, Madison would have said that the Zivotofsky's remedy was for Congress to limit the funding of the State Department's passport office! Justice Kennedy implicitly agreed with such a view when he underscored the narrow application of the court's determination of unconstitutionality. "In holding Section 214(d) invalid the Court does not question the substantial powers of Congress over foreign affairs in general or passports in particular. This case is confined solely to the exclusive power of the President to control recognition determinations."

In a case which had political ramifications surrounding the Israeli-Palestinian conflict, the Supreme Court ignored the geopolitical noise and stuck to the originalist view of Article Two of the Constitution regarding the president's role in foreign policy. *Zivotofsky v. Kerry* underscores the singularity of the Executive branch's authority to recognize sovereign powers, including, as in this case, U.S. policy on the status of Jerusalem.

Despite Congress being granted more powers than the other branches of government, in the Supreme Court's interpretation of the Constitution, the executive branch has more power in dealing with matters outside the borders of the U.S.

In Madisonian terms, the interpretation of the Constitution in this case demonstrates how, according to historian Greg Weiner, "The requirement of time ensures both that the statutory majority is heard on questions of policy and that the constitutive majority is heard in matters of fundamental law...the people must examine constitutionality from the multiple perspectives represented by each branch of government."

In the situation involving the Zivotofskys, those perspectives did not allow for a constitutional change to the broad authority of the president in U.S. foreign policy.

While the Zivotofsky case related to presidential power more than U.S. recognition of Jerusalem as Israel's capital, "Trump is asserting presidential power," constitutional scholar and Hoover Institution fellow Adam White told *The National Discourse*.

Luckily, Trump exercised that authority for the better in doing what was long overdue, although a future president can reverse the decision.

"If this action had been taken while *Zivotovsky* was pending, it would have mooted the case, because the president would no longer have had a qualm about listing 'Jerusalem, Israel' in the passport," the Cato Institute's Ilya Shapiro said to the *Discourse*. "But the precedent remains; if a future president reverses the policy, he could again instruct the State Department not to list a country in the passport."

Interestingly, Shapiro noted, "The fastest government action after a Supreme Court ruling in recent memory relates to the Lilly Ledbetter sex-discrimination case; after the Court ruled in 2007, Congress decided to change the law and the Ledbetter Act became the first bill President Obama signed."

Despite the two-year delay, better now than never.