

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   MENACHEM BINYAMIN ZIVOTOFSKY, BY   :

4   HIS PARENTS AND GUARDIANS, ARI Z.   :

5   AND NAOMI SIEGMAN ZIVOTOFSKY,       :

6                   Petitioner                   :   No. 10-699

7                   v.                               :

8   HILLARY RODHAM CLINTON, SECRETARY   :

9   OF STATE                               :

10  - - - - - x

11   Washington, D.C.

12   Monday, November 7, 2011

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14                   The above-entitled matter came on for oral  
15 argument before the Supreme Court of the United States  
16 at 10:02 a.m.

17 APPEARANCES:

18 NATHAN LEWIN, ESQ., Washington, D.C.; on behalf of  
19       Petitioner.

20 DONALD B. VERRILLI, JR., ESQ., Solicitor General,  
21       Department of Justice, Washington, D.C.; on behalf of  
22       Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 10-699, Zivotofsky v. Clinton.

Mr. Lewin.

ORAL ARGUMENT OF NATHAN LEWIN  
ON BEHALF OF THE PETITIONER

MR. LEWIN: Mr. -- Mr. Chief Justice, and may it please the Court:

In its recent decisions in *Medellin v. Texas* and in *Hamdan v. Rumsfeld*, this Court approved and applied the familiar tripartite scheme that Justice Jackson articulated in the *Steel Seizure* case. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. In that instance, said Justice Jackson, his claim to a power at once so conclusive and preclusive must be scrutinized with caution to preserve the equilibrium established by our constitutional system.

JUSTICE KAGAN: Well, Mr. Lewin, what power is Congress exercising here?

MR. LEWIN: Justice Kagan, Congress has exercised its power over passport -- the issuance of passports under the immigration, naturalization, and

1 foreign commerce powers that Congress has. It has  
2 enacted passport legislation back in 1856, in 1926. It  
3 can control what the contents of a passport ought to be,  
4 what its duration may be, how the application is to be  
5 made. And we say this is an identification --

6 JUSTICE ALITO: But do you think --

7 MR. LEWIN: -- portion of the passport.

8 JUSTICE ALITO: Do you think it's relevant  
9 that the title of section 214 is "United States Policy  
10 With Respect to Jerusalem as the Capital of Israel"?

11 MR. LEWIN: Well, we think -- and we've  
12 cited I guess in footnote 2 of our brief a number of  
13 recent cases of this Court that have said that you take  
14 each statutory provision independently and determine its  
15 constitutionality. True, Congress has a broader view  
16 with regard to the policy of Jerusalem being part of  
17 Israel than the executive branch has had since 1948.  
18 However, that purpose is not determinative of what the  
19 constitutionality is of subsection (d). Moreover --

20 JUSTICE GINSBURG: But you say, Mr. Lewin,  
21 that -- you're not claiming exclusivity in Congress.  
22 You say foreign relations is a shared power. So, if it  
23 is a shared power, why does Congress trump the  
24 executive?

25 MR. LEWIN: Because -- precisely because

1 under the standard of the Steel Seizure case and this  
2 tripartite scheme, if Congress determines that what the  
3 President has done -- and this is a statute which is  
4 really very narrow and deals with past conduct by the  
5 executive branch, as it were. It does not hobble the  
6 President in terms of future foreign policy.

7 JUSTICE KENNEDY: Well, under your -- under  
8 your theory -- and this is just following on Justice  
9 Ginsburg's question, I think. Under your theory, what  
10 foreign relations determinations are for the President  
11 alone to make?

12 MR. LEWIN: Foreign relations determinations  
13 are not left to the President alone.

14 JUSTICE KENNEDY: Are there any foreign  
15 relations determinations that are for the President  
16 alone to make under your theory of the case?

17 MR. LEWIN: Yes, Justice Kennedy.

18 JUSTICE KENNEDY: And those are?

19 MR. LEWIN: Those are diplomatic  
20 communications. In other, it's the President who  
21 makes --

22 JUSTICE KENNEDY: In other words, who gets  
23 the telegram or something?

24 MR. LEWIN: Well, who issues the  
25 communication to the foreign government, who

1 determines -- there are certain things that the  
2 President alone does because he's the one who implements  
3 foreign policy.

4 JUSTICE KENNEDY: Is there any treatise  
5 writer or decision of this Court that supports such a  
6 narrow, crabbed interpretation of the President's  
7 foreign affairs power?

8 MR. LEWIN: Well, with all respect,  
9 Justice Kennedy, we don't think it's crabbed. We think  
10 that that is exactly what Justice Jackson was referring  
11 to, and that's what this Court has said in the Medellin  
12 case and -- and in Hamdan as well, that if --

13 JUSTICE KENNEDY: Of course --

14 MR. LEWIN: Congress does not authorize --

15 JUSTICE KENNEDY: -- in part the Jackson  
16 tripartite division, this famous division he had, I  
17 think assumes the validity of the congressional statute  
18 at the first step of inquiry. And here that's the whole  
19 question.

20 MR. LEWIN: I don't know whether it's  
21 limited to the assumption with regard to the  
22 congressional statute. If Congress says, as it did in  
23 this case, we disapprove of the State Department's view  
24 that passports should not contain the -- the  
25 identification of Israel for people who were born in

1 Jerusalem, that is Congress disapproving of what the  
2 State Department and past State Department policy has  
3 been.

4 JUSTICE SOTOMAYOR: Mr. Lewin, you were cut  
5 off earlier when you were saying this reading doesn't  
6 hobble the President in the future.

7 It says anybody born in -- in Jerusalem can  
8 have Israel listed, correct? What happens if there's a  
9 peace accord tomorrow, and Israel gives up any claim to  
10 sovereignty over Jerusalem? Is the President free to  
11 stop listing Israel on the passport?

12 MR. LEWIN: If --

13 JUSTICE SOTOMAYOR: Or does he have to wait  
14 for Congress to change the law?

15 MR. LEWIN: I think he does have to wait for  
16 Congress to change the law.

17 JUSTICE SOTOMAYOR: So, you are hobbling the  
18 President with respect to situations that occur  
19 frequently --

20 MR. LEWIN: Well --

21 JUSTICE SOTOMAYOR: -- as happened in Egypt,  
22 sometimes overnight.

23 MR. LEWIN: No, but it may in some way, in a  
24 very remote possible way -- I mean, I think under those  
25 circumstances, if there were a peace treaty and if

1 Jerusalem were handed over to a Palestinian state, I  
2 think Congress would repeal the statute.

3 That's the point. Congress has the power,  
4 has the authority under the Constitution to enact laws,  
5 and it is Congress that makes the decision even with  
6 regard to foreign policy issues.

7 JUSTICE SOTOMAYOR: The Constitution  
8 requires ambassadors to be appointed with the consent of  
9 the Senate. It gives Congress the power of the purse.  
10 So, why don't -- why isn't the better view that we let  
11 Congress express its approval and disapproval in the  
12 mechanism set up by the Constitution to do so? Meaning,  
13 if the President recognizes a country that Congress  
14 doesn't want it to recognize, it can withhold approval  
15 of an ambassador. It could refuse to fund the embassy.  
16 It could do many other things.

17 But what entitles Congress to trench on a  
18 presidential power that has been exercised virtually  
19 since the beginning of the country?

20 MR. LEWIN: With all respect, Justice  
21 Sotomayor, I think history demonstrates that that's  
22 simply not true, that in fact Congress has had equal,  
23 quote, "recognition power," if in fact that's a power  
24 rather than a ceremonial duty. We have in our reply  
25 brief gone through the fact that from Presidents Monroe,



1 Jackson, Taylor, Lincoln, and even at the time of  
2 President McKinley, Congress said: We have the  
3 authority to be recognized -- to recognize.

4 JUSTICE KAGAN: Mr. Lewin, this gets back to  
5 the question of exactly what congressional power you're  
6 basing your argument on. You started by saying you were  
7 basing it on Congress's passport power, which is a  
8 function of its control over immigration issues. Now  
9 you're saying Congress has a co-equal recognition power.  
10 Which is it, or is it both?

11 MR. LEWIN: No. It's in the alternative,  
12 Justice Kagan; it is both. We submit first of all there  
13 is no exclusive recognition power in the President, if  
14 there is a recognition power, and we spell that out.

15 JUSTICE GINSBURG: Does that go the full  
16 length of saying if Congress passed a law that says the  
17 United States recognizes Jerusalem as the capital of  
18 Israel and Jerusalem must be designated as the capital  
19 of Israel in all official documents -- suppose that were  
20 the law. I take it, from everything you've argued, your  
21 position would be, yes, Congress has that authority.

22 MR. LEWIN: We say Congress has that  
23 authority, but I have to add, Justice Ginsburg, that  
24 Congress has been very careful in the past and we  
25 believe it will be in the future to give the President

1 broad authority. To the extent Congress has tried to do  
2 that, Congress has consistently said that the President  
3 can waive the moving of the embassy to Jerusalem,  
4 because Congress recognizes -- this is one of these very  
5 rare situations where Congress has said what the  
6 President has done and what the Department of State has  
7 done is simply wrong.

8 JUSTICE SCALIA: Mr. Lewin, you're -- it  
9 seems to me you're not arguing for a co-equal  
10 congressional power; you're arguing for a superior  
11 congressional power. You're saying whatever Congress  
12 says, the President has to comply with. Now, that's  
13 quite different from saying that they both have  
14 authority in the field. And if they both have authority  
15 in the field and they're exercising it in different  
16 fashions, I frankly would not be inclined to intervene.  
17 I would let -- I would let them conduct the usual  
18 inter-branch hand wrestling that goes on all the time,  
19 which probably means that if Congress cares enough,  
20 Congress will win because, as you say, it has an  
21 innumerable number of clubs with which to beat the  
22 executive.

23 But if -- if the power is a co-equal power  
24 and they're both exercising it in a -- in a different  
25 way, why don't we just, you know, let them go at it?

1 Why is it any of our business which is the better  
2 foreign policy position?

3 MR. LEWIN: We are not -- the Court is not  
4 being asked to determine what is the better foreign  
5 policy position. Congress has determined and --

6 JUSTICE SCALIA: Congress is supreme, then?  
7 That is your position. Not -- not that Congress has  
8 co-equal authority with the executive, but Congress is  
9 supreme.

10 MR. LEWIN: No, there's two aspects to this,  
11 Justice Scalia. One is the recognition power. As to  
12 the recognition power, if it exists, Congress has it  
13 together with the President. But with regard to foreign  
14 policy and with regard to the question of whether  
15 Congress can trump the President, this is not a new  
16 proposition. The Court determined it in the Steel  
17 Seizure case. The Court more recently, in -- in  
18 approving Justice Jackson's tripartite scheme, approved  
19 it in *Medellin v. Texas*.

20 CHIEF JUSTICE ROBERTS: Well, *Medellin*  
21 involved a situation where the President's purported  
22 exercise of authority changed domestic law, and not  
23 simply domestic law, but domestic State law. That seems  
24 to me to be quite a distinguishable circumstance.

25 MR. LEWIN: But what -- again, what Justice

1 Jackson said was that when there -- the two are  
2 incompatible, then you look, the Court looks and  
3 scrutinizes, "subjects to scrutiny" -- those words are  
4 in Justice Jackson's standard -- scrutinizes what the  
5 President has done.

6 And we submit in this case, if the Court  
7 were to look at the answers to the interrogatories in  
8 this case, what is the basis for the President's policy,  
9 if one scrutinizes it, we say in our brief, it's -- we  
10 call it trivial because what happens is the Department  
11 of State has said -- and, again, this is important in  
12 terms of this statute. All that happens with this  
13 statute is that 50,000 American citizens have the same  
14 passport as 100,000 other American citizens who were  
15 born in Tel Aviv or Haifa. It just says "Israel"; it  
16 doesn't say "Jerusalem, Israel"; it just says "Israel."  
17 And the State Department says that's justified because  
18 Arab countries or Palestinians may be upset if they  
19 misperceive --

20 CHIEF JUSTICE ROBERTS: What -- so, you're  
21 suggesting that the outcome of this of case would be  
22 different, from your perspective, if Congress said you  
23 have to say "Jerusalem, Israel."

24 MR. LEWIN: I say it's a different case,  
25 yes, absolutely. In this case, what -- the important

1 thing about this case and this statute is that it gives  
2 the individual passport holder a choice.

3 CHIEF JUSTICE ROBERTS: Why is it -- why is  
4 it a different case?

5 MR. LEWIN: It's a different case because if  
6 it were to say "Jerusalem, Israel," there would be more  
7 of an argument. Again, I'm not saying I would be here  
8 acknowledging that that's impermissible. But there  
9 would be more of an argument that it appears to be some  
10 official approval of Jerusalem being in Israel.

11 CHIEF JUSTICE ROBERTS: So, would there be  
12 -- there would be a greater concern -- the concern on  
13 the part of the executive that there would be adverse  
14 political reaction would have a greater degree of  
15 credibility?

16 MR. LEWIN: Somewhat greater degree.  
17 Again --

18 CHIEF JUSTICE ROBERTS: And so, we're  
19 supposed to decide whether or not the executive is  
20 correct in saying that it's a significant problem. And  
21 he says, well, he says that, but we know foreign policy  
22 better; we don't think it's going to be a big deal.

23 MR. LEWIN: No, I don't think the Court is  
24 being asked to decide a question of foreign policy.  
25 Congress has decided that saying "Israel" alone does not

1 present a foreign policy issue. Congress recognized  
2 that, with moving the embassy, there might be a foreign  
3 policy issue. So, they said that the President can  
4 waive that.

5 With regard to this provision, Congress has  
6 said, no, there's not likely to be any foreign policy  
7 harm. And all that the Court is being asked to do is  
8 it's being asked to enforce the congressional  
9 conclusion, which is, we submit, exactly what the third  
10 level under Justice Jackson's test is: That if, in  
11 fact, Congress decides that what the President has  
12 concluded or the executive branch has concluded is  
13 wrong, it may -- and it has the constitutional power to  
14 say -- with regard to foreign policy, we can exercise  
15 our determination.

16 CHIEF JUSTICE ROBERTS: I don't see Justice  
17 Jackson's analysis -- what he's saying -- and I guess I  
18 don't think it's as controlling as others might. He's  
19 saying when there's a conflict, it's a harder case.

20 MR. LEWIN: Yes.

21 CHIEF JUSTICE ROBERTS: When there's -- when  
22 they agree, it's an easy case. When you can't tell,  
23 it's sort of a middle case. I don't see how that's very  
24 helpful in resolving the dispute before us.

25 MR. LEWIN: Well, because he says that when

1 it's in the third category, the Court has an obligation,  
2 under those circumstances if it's going to keep the  
3 equilibrium of the balance of powers, to look at what  
4 the President's justification is.

5 The word "scrutiny" is in there. That's not  
6 simply a phrase that Justice Jackson has taken out of  
7 the air. He says you're supposed to scrutinize it. And  
8 if you scrutinize it in this case, there's nothing other  
9 than the possibility that there would be a misperception  
10 by Palestinians. That's what the State Department is  
11 saying.

12 JUSTICE SCALIA: What -- what were we  
13 scrutinizing in the Steel Seizure case?

14 MR. LEWIN: I think in the Steel Seizure  
15 case, the Court was scrutinizing whether --  
16 notwithstanding the fact that Congress did not give the  
17 President the power to seize steel mills, nonetheless  
18 whether there could be some justification that, even in  
19 -- contrary to Congress's wishes, the President would be  
20 able to exercise that power.

21 JUSTICE SCALIA: And what presidential power  
22 would have supported that, the war power?

23 MR. LEWIN: Well, possibly the claim that as  
24 Commander in Chief under -- in the time of the Korean  
25 War he would be able --

1 JUSTICE SCALIA: Right, because he was  
2 claiming that the Korean War --

3 MR. LEWIN: Entitled him --

4 JUSTICE SCALIA: -- required that these --  
5 that these companies remain in business. And I guess we  
6 did scrutinize that. What did we conclude, that that  
7 was --

8 MR. LEWIN: And I think the Court concluded  
9 that, no, that that did not justify the exercise of the  
10 President's power even though it was --

11 JUSTICE SCALIA: But --

12 JUSTICE KENNEDY: But that wasn't a case --  
13 that wasn't a case in which the Congress had said you  
14 may not seize mills. And that's what your case is. So,  
15 there's a difference.

16 MR. LEWIN: Well, but that's -- that's an a  
17 fortiori situation, Justice Kennedy. If Congress didn't  
18 even say you may not seize steel mills, but simply  
19 because they didn't give the President affirmatively the  
20 authority --

21 JUSTICE KENNEDY: It -- it is if you assume  
22 that the statute is valid.

23 MR. LEWIN: Well, but the statute in this  
24 case -- again I come back to the fact that the statute  
25 in this case is a passport statute.



1 JUSTICE KENNEDY: If the statute is -- if  
2 the statute is invalid, we're in category one.

3 MR. LEWIN: Yes, but --

4 JUSTICE KENNEDY: Or two.

5 MR. LEWIN: But the statute in this case is  
6 a -- on its face, a passport statute. There's no  
7 reason --

8 JUSTICE KAGAN: But it's a passport statute  
9 that --

10 MR. LEWIN: It's an identification.

11 JUSTICE KAGAN: I'm sorry. It's a passport  
12 statute that seems to have nothing to do with the  
13 immigration functions that passport statutes usually  
14 serve. It seems to have everything to do with  
15 Congress's declaration of a foreign policy, as opposed  
16 to Congress's exercise of power relating to immigration  
17 control. So, convince me that I am wrong on that.

18 MR. LEWIN: I think you are wrong on that,  
19 Justice, and let me explain why.

20 (Laughter.)

21 MR. LEWIN: Let me explain why. Because it  
22 is clear from the history of this line on the passport  
23 that it is purely an identification of the individual;  
24 it is not an exercise of any foreign policy. Indeed,  
25 the passport statute itself says that a passport is "any

1 travel document issued by competent authority showing  
2 the bearer's origin, identity, and nationality." And in  
3 this case, the history of this line on the passport  
4 demonstrates, I think conclusively, and the State  
5 Department has acknowledged it, that it is purely a  
6 means of identification.

7 JUSTICE ALITO: Are you suggesting --

8 MR. LEWIN: And what Congress has said is,  
9 with regard to these citizens, we will permit them to  
10 identify themselves, like Congress permitted the  
11 Taiwanese to identify themselves.

12 JUSTICE ALITO: But are you suggesting  
13 Congress enacted this because they thought that if these  
14 individuals' passports simply said "Jerusalem," there  
15 would be an identification problem?

16 MR. LEWIN: Not be -- Justice Alito, it's  
17 not because there would be an identification problem.  
18 But there was -- Congress recognized that with regard to  
19 the 50,000 people who have a passport that says  
20 "Jerusalem," they are being denied a certain sense of  
21 self-respect that they feel they should be able to have  
22 in terms of their own identification.

23 This is not a statute that's designed to  
24 create some political brouhaha or -- or make a foreign  
25 policy statement. It's a statute that, frankly, fits in

1 with what the State Department does in accommodating to  
2 individual passport holders. The State Department says  
3 if you're a Palestinian or an Arab and you were born in  
4 Haifa and you don't like seeing "Israel" on your  
5 passport, we'll allow you to eliminate "Israel" from  
6 your passport. And all that Congress has said is --

7 JUSTICE KAGAN: That might be true, Mr.  
8 Lewin. I think you would have a better argument if this  
9 statute said if you were born in Jerusalem, you can pick  
10 anything you want in your passport; you can pick  
11 Jerusalem, you can pick Israel, or you can pick  
12 Palestine. But the statute in fact doesn't say that.  
13 It says you can pick Israel.

14 So, why isn't that a statement of foreign  
15 policy as to recognition that Jerusalem is the capital  
16 of Israel, as opposed to what you're characterizing it  
17 as, which is a freedom of -- you know, a sort of choice  
18 provision?

19 MR. LEWIN: I think that's -- what you said  
20 the statute doesn't say, Justice Kagan, is exactly what  
21 the statute does say. The statute does say that the  
22 individual passport holder can choose to say "Israel" or  
23 can keep it as "Jerusalem," and if he's born before  
24 1948, he can say "Palestine." So, it is an individual  
25 choice.

1 JUSTICE KAGAN: Well, you have to be very  
2 old to say "Palestine."

3 MR. LEWIN: Pardon? Pardon?

4 JUSTICE GINSBURG: Not all that old.

5 (Laughter.)

6 MR. LEWIN: It's -- I guess it's a  
7 reflection on my own seniority that --

8 (Laughter.)

9 MR. LEWIN: -- it's my generation that fits  
10 into that. But -- but the fact is exactly; our point is  
11 that that's all that the statute does. The statute is a  
12 means of permitting self-identification by an American  
13 citizen who says: My birth in Jerusalem, indeed in West  
14 Jerusalem, which has always been recognized to be part  
15 of Israel -- I want to call -- I want my passport to say  
16 "Israel."

17 CHIEF JUSTICE ROBERTS: But it's recognizing  
18 that principle only with respect to a particular  
19 jurisdiction. An American citizen born in Northern  
20 Ireland doesn't have this option, because he thinks  
21 that's part of Ireland.

22 MR. LEWIN: No, but an American citizen born  
23 in Taiwan apparently does have that option, even the  
24 though the United States says we don't recognize Taiwan  
25 as an independent country.

1 CHIEF JUSTICE ROBERTS: And your -- and your  
2 friend on behalf of the United States says that's  
3 because of a State Department judgment that in one  
4 situation, it's significant; in the other, it's not.

5 MR. LEWIN: Well, it's -- no, it's not just  
6 because. It's because what happens is there is a  
7 recognition in both cases that it is a personal  
8 identification choice with regard to what goes on the  
9 passport. Sure, in that case, the State Department  
10 didn't take it to litigation, although I submit that had  
11 they chosen to litigate that case, they would have a  
12 stronger position than they have in this case.

13 JUSTICE SCALIA: But a personal  
14 identification choice can also have significant foreign  
15 policy implications, can it not? Is -- is that an  
16 either-or situation?

17 What the State Department is saying is to  
18 allow this particular personal identification choice may  
19 antagonize some foreign nations that we don't want to  
20 antagonize.

21 What if they gave them the choice of saying  
22 "Israel, the only democracy in the Middle East"? Okay?  
23 That's their choice. They can have that on their  
24 passport. Would that be okay?

25 MR. LEWIN: I have to say that, given this

1 Court's view about Congress's power with regard to (a)  
2 passports -- and again, I go back to the fact that in  
3 *Zemel v. Rusk*, in *Haig v. Agee*, in *Kent v. Dulles*, in  
4 all these passport cases, this Court said we look to see  
5 whether what the President does is authorized by  
6 Congress, whether implicitly or otherwise. So that, I  
7 submit, that with regard to passports, you need the  
8 congressional authority, whether it's implicit or  
9 express.

10 And with regard to your question,  
11 Justice Scalia, yes, Congress could in an exercise of  
12 its passport authority say here is what the passport has  
13 to say. It would be a foolish statute. But this Court  
14 has said, and I think you, Justice Scalia, have said it  
15 many times, it's not the Court's job to determine  
16 whether Congress is foolish or not. If Congress decides  
17 that, look, somebody born in Israel, a passport should  
18 say "Israel, the only democracy in the Middle East,"  
19 Congress can say that. Congress has passport authority.  
20 And this --

21 JUSTICE GINSBURG: Mr. Lewin, I take it from  
22 what you --

23 MR. LEWIN: -- and this has to do with the  
24 contents of the passport.

25 JUSTICE GINSBURG: What you've argued is

1 that you're skipping over the question that the D.C.  
2 Circuit decided. I take it your view is it's not a  
3 political question; so, the Court should resolve the  
4 merits.

5 MR. LEWIN: Our view is it's not a political  
6 question because it is like many other questions that  
7 affect foreign policy. And the Court said in Baker v.  
8 Carr, not every decision that touches on foreign affairs  
9 or foreign policy is a political question that can't be  
10 determined. It -- it -- arguably, according to the  
11 Government, this affects foreign policy. We say it is  
12 simply Congress having passed a statute which either is  
13 unconstitutional -- we say it is constitutional --  
14 either is unconstitutional or the Court should simply  
15 enforce it, like in the Japan Whaling case.

16 In the Japan Whaling case, this Court  
17 rejected the claim that the outcome of a determination  
18 by the Court might very well affect foreign relations,  
19 and it said it's not a political question.

20 I'd like to reserve the remaining time for  
21 rebuttal. Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
23 Lewin.

24 General Verrilli.

25 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

1 ON BEHALF OF THE RESPONDENT

2 GENERAL VERRILLI: Mr. Chief Justice, and  
3 may it please the Court:

4 The executive has determined that the  
5 passports it issues should not identify Israel as the  
6 place of birth for persons born in Jerusalem.  
7 Petitioner seeks relief under section 214(d) that would  
8 countermand that executive judgment. But under the  
9 Constitution, that is an exercise of the executive's  
10 exclusive recognition power. The Constitution commits  
11 that power exclusively to the executive, and neither a  
12 court nor the Congress can override that judgment.

13 CHIEF JUSTICE ROBERTS: Your friend --

14 JUSTICE GINSBURG: What of all the --

15 CHIEF JUSTICE ROBERTS: Your friend  
16 documented contrary history at some length in his reply  
17 brief, where from the beginning at least, as he says,  
18 through the McKinley Administration, the two branches  
19 acted as if they had co-equal authority.

20 GENERAL VERRILLI: Mr. Chief Justice, if I  
21 might spend a minute or two on that history, because I  
22 don't think it shows what my friend suggests that it  
23 does.

24 Before getting to the starting point of that  
25 story, which I think is the Monroe administration, I



1 would like to point out that in the Washington  
2 administration, the President confronted the question  
3 with respect to whether to recognize the revolutionary  
4 government of France. And President Washington  
5 consulted with his cabinet, and, of course, his cabinet  
6 included Jefferson and Madison and Hamilton and Jay.  
7 And they decided that this was a power that was  
8 exclusive to the President to such an extent that they  
9 didn't even need to send a message to the Congress that  
10 they were going to recognize the new revolutionary  
11 government in France.

12 Now, the second fact that I think is  
13 critical as a matter of history is that there is not a  
14 single piece of legislation that has passed both houses  
15 of Congress and come to the President purporting to  
16 recognize a foreign nation or a territorial boundary of  
17 a foreign nation.

18 JUSTICE ALITO: Has there ever been an  
19 instance in which the President has recognized a foreign  
20 government over Congress's sustained objection?

21 GENERAL VERRILLI: I don't -- I can't think of  
22 an instance of Congress's sustained objection. I think  
23 probably the closest we would come is the revolutionary  
24 government of Mexico, which President Wilson first  
25 recognized on a de facto basis in 1915 and a de jure

1 basis in 1917. Congress indicated displeasure with  
2 that. President Wilson sent his message to Congress  
3 saying that this is an exclusive executive function.  
4 Congress backed down.

5 JUSTICE BREYER: What are then the reasons  
6 that -- because your friend says that this is an a  
7 fortiori case from everything, because all of these  
8 words -- every time the word "exclusive power" has  
9 appeared in any source -- I think that's what you're  
10 saying -- it is meant that the President can act without  
11 supporting authority from Congress. But there never has  
12 been a case or a suggestion that the President can act  
13 where Congress has legislated to the contrary. Now, I  
14 think that's the -- that's the argument. And so, what  
15 -- I would like to hear what you have to say about that  
16 argument.

17 GENERAL VERRILLI: Yes. Yes, I will answer  
18 that question directly.

19 JUSTICE BREYER: Uh-huh.

20 GENERAL VERRILLI: It is true that the Court  
21 has never before, with respect to the recognition power,  
22 confronted the question of whether the President is free  
23 to act in a manner different than a congressional  
24 command because Congress has never purported to issue a  
25 command. That does not mean, however, that my friend is

1 correct that this is a situation in which Congress has  
2 the authority to countermand or direct the decision of  
3 the President.

4           This is, we submit -- even if one thinks  
5 about this as a Youngstown category three case, this is  
6 a Youngstown category three case of the kind that  
7 Justice Jackson identified in footnote 4, where he cited  
8 *Myers v. The United States*. The kind of case in  
9 category three of Youngstown, in which the President's  
10 judgment can prevail even over a contrary judgment of  
11 Congress, is a case in which the President has exclusive  
12 authority.

13           JUSTICE BREYER: All right. Now --

14           GENERAL VERRILLI: And that is this case.

15           JUSTICE BREYER: But my question is, what  
16 leads you to that conclusion?

17           GENERAL VERRILLI: Well, let me --

18           JUSTICE BREYER: What are -- there are very,  
19 very few cases I can ever think of where -- where the  
20 President -- where the Court has said the President can  
21 act contrary to a statute. And so, the point of my  
22 question was to get you to talk about --

23           GENERAL VERRILLI: Yes.

24           JUSTICE BREYER: -- why, even though this is  
25 a fortiori.

1                   GENERAL VERRILLI:  So, I do think, if I  
2  could -- I think it would be helpful in answering your  
3  question, Justice Breyer, if I could return to the Chief  
4  Justice's question about history.  Moving beyond that  
5  initial recognition by Washington that this is an  
6  exclusive power, which I think is quite significant,  
7  when we get to the Monroe administration, there is a  
8  fight between Clay and Monroe about whether the  
9  President has exclusive authority to recognize the new  
10 South American republics.

11                   Now, a couple of points there.  I think the  
12 -- what -- the only thing that one could point to as an  
13 action by the Congress that even implicates the  
14 recognition power is one house of Congress passed an  
15 appropriations measure for an ambassador.  What the --  
16 the history treatise, the Goebel treatise that my friend  
17 cites, says on page 133, the very page that he cites in  
18 his reply brief, is that Clay's effort to contest the  
19 President's exclusive authority came to a, quote,  
20 "inglorious end," unquote.

21                   He then goes on to say -- my friend goes on  
22 to say, well, but a year later when President Monroe  
23 sought to actually recognize these South American  
24 republics, he asked -- he asked the Congress to join him  
25 in it.  What he asked Congress for was an appropriation

1 for an ambassador. But it was not the sending of an  
2 ambassador to the Republic of Colombia that was the  
3 recognition. It was when President Monroe received an  
4 ambassador from Colombia that constituted the  
5 recognition, and that was an exclusive act that he  
6 undertook without any consultation with Congress.

7 Now --

8 JUSTICE GINSBURG: The two examples that are  
9 given in the brief, one of Texas, where Petitioner says  
10 there was a case where Congress went first -- Congress  
11 recognized and the President acquiesced, and the same  
12 thing with Taiwan; it was a statute and the President  
13 implemented it. So, if the -- Congress thought it had  
14 the authority, the recognition authority, in those two  
15 measures, and the President acquiesced.

16 GENERAL VERRILLI: I'd like to address Texas  
17 because I do think that's probably the most significant  
18 example that my friend's identified. But even there, I  
19 think if one works through the history, we'll see that  
20 it's an exclusive executive power.

21 President Jackson, in his first letter in  
22 1836 to the Congress, says essentially: I hear you; you  
23 think we should recognize Texas. And then he says:  
24 It's an open question as far as I am concerned whether  
25 there's exclusive authority or not. It's not been

1 something that the legislature has ever studied, but as  
2 a matter of expediency, he says, we don't need to  
3 resolve that question, because I want to work with you.  
4 He then goes on to caution the Congress to not move too  
5 quickly for fear of precipitating war with Mexico, which  
6 I think, Justice Breyer, I'll try to return to a  
7 functional analysis later, and that's, I think, an  
8 important point.

9                   What -- then -- but I think what's  
10 important, Justice Ginsburg, is that what Congress did  
11 next was to pass two appropriations measures, one in the  
12 House, one in the Senate. Each of those measures  
13 appropriates funds for an emissary to the Republic of  
14 Texas, but each includes language that says: At such  
15 time that the President determines that it's appropriate  
16 to do so.

17                   If one looks at the page in the  
18 Congressional Globe that my friend cites, one will see  
19 that that language was added because, as originally  
20 introduced, the appropriations riders were objected to  
21 by members of Congress on the ground that they infringed  
22 on the President's exclusive recognition authority.

23                   CHIEF JUSTICE ROBERTS: Counsel, if I could  
24 stop you and just have you address the political  
25 question doctrine.

1                   GENERAL VERRILLI:  Sure.

2                   CHIEF JUSTICE ROBERTS:  You say this is  
3 exclusively committed to the President, and, therefore,  
4 it is a non-justiciable political question.  How is that  
5 different from saying it's our job to decide cases, it  
6 is justiciable, and then you can argue that the answer  
7 of that analysis is that it's exclusively committed to  
8 the President?  I don't understand why labeling it a  
9 political question advances the analysis much.

10                  GENERAL VERRILLI:  Well, I think we agree,  
11 Mr. Chief Justice, that there isn't a very great deal  
12 of difference.  We acknowledge that in conducting the  
13 political question analysis, that it is for the Court to  
14 decide whether there's a textual commitment to the  
15 executive; it is for the Court to decide the scope.  We  
16 think that's what *Nixon v. United States* says; it's what  
17 *Powell v. McCormack* says; and that in answering those  
18 questions, we think that the Court will have gone a very  
19 long way to determining the question of the --

20                  JUSTICE GINSBURG:  Why not all the way?  I  
21 mean, if the Court decides that the Constitution commits  
22 this authority exclusively to the President, then it's  
23 all over.  That's the merits of the case:  Does the  
24 President have this authority?  So, the political  
25 question label seems to be kind of a -- a subterfuge

1 because if there is a textual commission -- commitment  
2 to the President, that's the end of the case.

3 GENERAL VERRILLI: Well, the -- I do think  
4 that with respect to the first Baker v. Carr factor,  
5 textual commitment is a factor that the Court has  
6 indicated is one that can lead to the conclusion that  
7 it's a political question.

8 I do think that the Court has to go through  
9 the analysis. And so, at the end of the day, there may  
10 not be very much of a difference -- -

11 JUSTICE ALITO: Well, doesn't it depend on  
12 what the question is? In order to decide whether it's a  
13 political question, you have to identify the question.  
14 Now, if the question is whether the President has  
15 exclusive authority with respect to the formal  
16 recognition of a foreign country, that might be one  
17 thing. But what if the question is whether the  
18 President has exclusive jurisdiction with respect -- has  
19 plenary authority, unreviewable authority, with respect  
20 to anything that the President thinks has a bearing on  
21 the question of recognition.

22 Now, if that's the question, is that  
23 committed exclusively to the President?

24 GENERAL VERRILLI: No, Justice Alito, we  
25 don't -- we think Powell v. McCormack and Nixon say



1 that the question of -- not just the question of  
2 commitment, but also the question of scope, are questions  
3 for the Court to decide.

4           And we do think, with respect to the  
5 question here, that even though it's for the Court to  
6 decide, it's for the Court to decide with a very  
7 significant measure of deference, because when -- the  
8 decision by the executive with respect to how it's going  
9 to handle the status of Jerusalem in passports is a very  
10 sensitive and delicate matter. This position was  
11 arrived at after very careful thought, and it is  
12 enforced very carefully. And I think from that should  
13 come the lesson that this -- and the reason is because  
14 the executive believes that the statement on the  
15 passport has to be understood as a manifestation of the  
16 President's exercise of the recognition power.

17           JUSTICE KAGAN: Well, suppose this, General  
18 Verrilli: Suppose that this statute -- there was the  
19 section that's there now, and then there was another  
20 section, and the section said: The recording of Israel  
21 as a place of birth on a passport shall not constitute  
22 recognition of Israel's sovereignty over Jerusalem.

23                           Would that be constitutional?

24           GENERAL VERRILLI: I -- I don't think it  
25 would change the analysis, Justice Kagan. I -- I think

1 -- of course, that is not this statute, which has a title  
2 which says "United States Policy With Respect to  
3 Jerusalem as the Capital of Israel." But --

4 JUSTICE KAGAN: No, my statute has a title  
5 which says "Identification of Persons Born in  
6 Jerusalem."

7 GENERAL VERRILLI: I still -- I still think  
8 that would be within the scope of the executive's power  
9 to decide because the content of the passport, insofar  
10 as the Executive believes that it constitutes an  
11 expression of -- of an incident of recognition, is a  
12 judgment that the executive makes.

13 Now, the Court can review that, but the  
14 Court's review of it should be done with a significant  
15 measure of deference as the Court suggested in *Regan v.*  
16 *Wald*. Now --

17 JUSTICE SOTOMAYOR: General, what is --

18 JUSTICE KENNEDY: That seems to me different  
19 than the rationale of the D.C. Circuit. It seems to me  
20 you're not defending the rationale of the D.C.  
21 Circuit --

22 GENERAL VERRILLI: No --

23 JUSTICE KENNEDY: -- that there's no  
24 jurisdiction.

25 GENERAL VERRILLI: No, we --

1 JUSTICE KENNEDY: And, you know, it's --  
2 it's always awkward for us to tell counsel what's in  
3 their best interest, but --

4 (Laughter.)

5 JUSTICE KENNEDY: But it does -- it does  
6 seem to me that your position would be much stronger if  
7 you said there is jurisdiction, and the President wins.

8 GENERAL VERRILLI: Well, we think -- we do  
9 think that if there is jurisdiction, the President wins.  
10 But we do think that the D.C. Circuit acted  
11 appropriately in finding that --

12 JUSTICE KENNEDY: Because if this -- if this  
13 rationale remains the law and is the law, then you have  
14 the specter of constant legislative determinations that  
15 are not clearly -- not clearly invalid. And it seems to  
16 me that's, again with all due respect, not in the best  
17 interest of the ultimate argument you're making.

18 GENERAL VERRILLI: Well, we appreciate that,  
19 Justice Kennedy. We do think that in resolving a  
20 political question -- in conducting a political question  
21 analysis, the questions that the Court would need to  
22 decide under Nixon and Powell would go a very long way  
23 to clarifying that problem.

24 CHIEF JUSTICE ROBERTS: What if --

25 JUSTICE SOTOMAYOR: General --

1 CHIEF JUSTICE ROBERTS: What if Congress's  
2 statute said what you must put on the passport, if  
3 requested, is "Israel," parentheses, ("Disputed"), close  
4 parentheses? Which would seem to take care of your  
5 objection that people are going to look at this and draw  
6 a false conclusion.

7 GENERAL VERRILLI: I don't think that changes  
8 the analysis, Mr. Chief Justice, because I think that  
9 that -- the -- to the -- because it would -- that would  
10 be again Congress seeking to direct a judgment of the --

11 CHIEF JUSTICE ROBERTS: It is the position  
12 of the administration, isn't it, that the status of  
13 Jerusalem is disputed?

14 GENERAL VERRILLI: That's correct, Mr. Chief  
15 Justice, but it -- what the United States says about  
16 that in official communications -- and remember, a  
17 passport is not a communication by the passport holder.  
18 It's an official United States document that  
19 communicates the position of the United States.

20 That's --

21 CHIEF JUSTICE ROBERTS: So, what if Congress  
22 says, in the place that you have it, this person has the  
23 choice of whether or not to put "Jerusalem" or "Israel"?  
24 This doesn't affect whether the United States recognizes  
25 Jerusalem as part of Israel or not; it's just his

1 choice. Same problem?

2 GENERAL VERRILLI: Same problem, Mr. Chief  
3 Justice. This is --

4 CHIEF JUSTICE ROBERTS: Really?

5 GENERAL VERRILLI: Yes.

6 CHIEF JUSTICE ROBERTS: I thought your  
7 argument was that someone's going to look at that and  
8 say that -- that offends me, that you're calling this  
9 part of Israel. That was the foreign policy  
10 significance. And I tried to give you a hypothetical in  
11 which nobody could reasonably draw that conclusion, and  
12 you say still, same thing.

13 GENERAL VERRILLI: I do think that this is an  
14 area in which the executive's got to make the judgment  
15 because it's of paramount importance that the nation  
16 speak with one voice.

17 JUSTICE GINSBURG: Then -- General Verrilli,  
18 then you are taking the position that this is not a  
19 shared authority; it's an exclusive authority, that  
20 there is no role for Congress. Am I right? Or is there  
21 some role in recognition for -- for Congress?

22 GENERAL VERRILLI: Our position, Justice  
23 Ginsburg, is that the recognition power is exclusive to  
24 the President.

25 JUSTICE SCALIA: What if -- what if the

1 recognition of a breakaway province of a foreign country  
2 by the United States will clearly provoke a war with  
3 that country. Would Congress have the power to decree  
4 that the President shall not recognize that breakaway  
5 province, knowing -- knowing that if he does recognize  
6 it, that country will declare war on the United States?

7 GENERAL VERRILLI: I think, Justice Scalia,  
8 that's a situation in which the President would exercise  
9 that recognition power very carefully --

10 JUSTICE SCALIA: No, no. We have a foolish  
11 President.

12 (Laughter.)

13 JUSTICE SCALIA: Contrary to our entire  
14 history, we have a --

15 (Laughter.)

16 GENERAL VERRILLI: I think -- although I  
17 don't -- I just don't think that in a situation like  
18 that, the President would exercise a recognition power,  
19 but if -- but if the President did, it's the President's  
20 judgment to make.

21 And I -- Justice Breyer, if I could get back  
22 to your question, in addition to the --

23 JUSTICE SCALIA: Please stay on this.

24 GENERAL VERRILLI: I'm sorry.

25 JUSTICE SCALIA: I am -- I am willing --

1 (Laughter.)

2 JUSTICE SCALIA: Our cases say repeatedly  
3 that the President is the sole instrument of the United  
4 States for the conduct of foreign policy, but to be the  
5 sole instrument and to determine the foreign policy are  
6 two quite different things. To say he's the sole  
7 instrument simply means that congressmen traveling  
8 abroad or globetrotting ex-presidents -- nobody except  
9 the President of the United States pronounces the  
10 foreign policy. But it doesn't necessarily mean that  
11 the President determines everything in foreign policy.

12 He's the instrument, but there is certainly  
13 room in those many cases for saying that Congress can  
14 say what the -- what it's -- what the country's  
15 instrument is supposed to do.

16 GENERAL VERRILLI: I -- I think with respect to  
17 the question of recognition, Justice Scalia, that it is  
18 a power that rests with the executive. And I think in  
19 addition to the history, in that we do -- now in  
20 220-plus years in our Constitution, do not have a single  
21 example of Congress actually exercising the power, and I  
22 think in addition to the history, there are very good  
23 functional reasons why that is so.

24 And I think, Justice Breyer -- in answering  
25 your earlier question, I think those are significant.

1 The exercise of the recognition power depends, we think,  
2 on three things that make it clear that it needs to be  
3 exclusive. The first is timing; the second is  
4 expertise; and the third is a need for secrecy.

5 Timing --

6 JUSTICE KENNEDY: I didn't hear the third.

7 GENERAL VERRILLI: The need for secrecy.

8 Timing is -- I think the Israel example  
9 shows, is of critical importance. But it's not just  
10 speed. Of course, Congress can't act with the dispatch  
11 needed in a situation like the recognition of Israel.  
12 But the -- but apart from that, recognition -- a  
13 recognition that occurs too soon could send events in a  
14 direction that could be very disadvantageous to our  
15 foreign policy. A recognition that comes too late  
16 could -- could squander an important opportunity in the  
17 national interest in the foreign policy realm.

18 JUSTICE KAGAN: General Verrilli, is the  
19 textual basis for your argument that the President has  
20 exclusive power here? Is it the Receipt of Ambassadors  
21 Clause alone, or is it something else? Because I was  
22 frankly a little bit surprised that your brief put so  
23 much weight on that Receipt of Ambassadors Clause, which  
24 arguably was meant to give the President a purely  
25 ministerial function and so little weight on any other



1 power that the President has.

2 GENERAL VERRILLI: So -- here's our position on  
3 that, Justice Kagan: We do think that the Reception  
4 Clause is the source of the recognition power. Hamilton  
5 identified it as the source of the recognition power in  
6 the Washington administration. I think it's now  
7 understood that it's hornbook law that that's the  
8 textual source, but to the extent that --

9 JUSTICE SCALIA: Well, it's the best there  
10 is.

11 GENERAL VERRILLI: But --

12 JUSTICE SCALIA: I mean, if you've got to  
13 cast about for something, I suppose -- I don't know what  
14 else you'd -- you'd land upon.

15 GENERAL VERRILLI: It is there.

16 JUSTICE SCALIA: Well, it is there. It  
17 doesn't say a whole lot.

18 GENERAL VERRILLI: And in addition -- I would  
19 say in addition, to the extent there is a question, we  
20 do think, as I think we indicated in our brief, that --  
21 that one can see this power as part of what the Court in  
22 Garamendi described as the vast share of responsibility  
23 that the Constitution assigns to the executive. Now, we  
24 don't think all of that shared responsibility is  
25 exclusive to the executive, but we think this

1 responsibility is exclusive.

2 JUSTICE KAGAN: So, if that provision were  
3 not in the Constitution, would you be making the same  
4 argument you are now?

5 GENERAL VERRILLI: If the Reception Clause  
6 were not in the Constitution, but we had the same history  
7 that we have now and the same functional considerations  
8 about the need for it being in the control of the  
9 executive, yes, we would.

10 JUSTICE ALITO: There are many things that  
11 Congress could do to frustrate the President's decision  
12 to recognize another country. Now, would you say all of  
13 those are unconstitutional? They all infringe the  
14 President's exclusive recognition authority?

15 Suppose the President decides to recognize a  
16 country, and Congress refuses to appropriate any money  
17 for an embassy there or refuses to confirm any U.S.  
18 ambassador to that country. Those presumably would not  
19 be unconstitutional, would they?

20 GENERAL VERRILLI: The -- I think that there  
21 would be a difference between -- I -- I think that --  
22 that Congress has authority over appropriations.  
23 Congress has authority to appoint ambassadors. It's  
24 entitled to exercise that authority, and it's entitled  
25 to exercise that authority even if it's in tension with

1 the President's recognition decision.

2           It is the position of the executive, though,  
3 that there could be circumstances in which Congress  
4 could try to exercise its appropriations authority in a  
5 way that would preclude the executive from exercising  
6 its -- its recognition power, and that -- the executive  
7 would in some circumstances believe that it had the  
8 authority to move ahead despite those actions by  
9 Congress.

10           But, of course, this is not a situation in  
11 which Congress has passed a sense of the Congress  
12 resolution about what it thinks. It's not a situation  
13 in which Congress has exercised attaching conditions to  
14 its spending power about what private parties do. This  
15 is an effort by Congress to regulate the content of a  
16 passport, which, as the Court recognized in *Haig v.*  
17 *Agee*, is a core instrument of diplomatic communication.

18           JUSTICE ALITO: Do you think that's an  
19 exclusive power, to -- to determine of the contents of  
20 passports? Hasn't Congress exercised that authority --

21           GENERAL VERRILLI: We --

22           JUSTICE ALITO: -- for a long time.

23           GENERAL VERRILLI: We don't think that the  
24 entire content of passports is an exclusive power. I  
25 would -- and I'll explain, Justice Alito, where we think

1 the line is. But before doing so, I do want to push  
2 back a little bit on the notion that Congress has for a  
3 long time exercised authority over the content of  
4 passports.

5 The first Passport Act was in 1856. What  
6 this Court said in *Haig v. Agee* was that the enactment  
7 of that statute merely confirmed a power that everyone  
8 understood to be inherent in the executive. That  
9 statute did not purport to regulate the content of  
10 passports. It, in fact, said that passports shall be  
11 issued under such rules as the President shall  
12 proscribe. And -- and in *Haig*, that was that language,  
13 I think, that led the Court to conclude that this was a  
14 confirmation of the executive's authority and an action  
15 in aid of that authority. Now --

16 JUSTICE BREYER: I just want -- I don't want  
17 the time to elapse. You can finish that if you'd like.  
18 I'd just like somewhere a few words about the political  
19 question, which you don't believe in. From reading your  
20 brief, I would say you don't believe in it much. And my  
21 question on the political question for either of you is  
22 this: that -- that this is an area of foreign affairs.  
23 It's an area of -- of, you know, recognition. We know  
24 that. Never has this Court or anyone else held that  
25 Congress can go ahead in this area over a law passed by

1 Congress. But it is passports, which both regulate.  
2 And our real problem is these are words that are  
3 officially said and they are detailed words, and those  
4 words may really disrupt coherent foreign policy.  
5 Viewed that way, there are billions of words that might  
6 have the same effect. And do we know that these words  
7 will and some other words won't? No, judges don't know  
8 that.

9                   And, therefore, when you get into this area,  
10 the best thing to do is avoid multifarious  
11 pronouncements by various departments of government on  
12 one question; do not respect the views of other  
13 branches; and, judges, stay out of it. Let them work it  
14 out by themselves.

15                   I just want a word from either you and  
16 really Mr. Lewin on -- on that.

17                   GENERAL VERRILLI: Yes. Well, we do think --  
18 that's what -- we think that the appropriate inquiry for  
19 political question purposes is into the relief that the  
20 Petitioner is seeking and if the relief the Petitioner  
21 is seeking would invade the kinds of judgments that the  
22 Constitution commits exclusively to the executive. And  
23 the reason it commits these kinds of judgments  
24 exclusively to the executive is because this is a  
25 situation in which multifarious voices are inimical to

1 the national interest.

2 JUSTICE GINSBURG: But that is still --  
3 that's a merits determination. The whole question is,  
4 who has the authority? And whatever label you put on  
5 it, if you decide that the President has, as you just  
6 said, the exclusive authority, that's the end of the  
7 matter. It -- it's not leaving it -- it is not leaving  
8 it, as Justice Breyer said, to the political branches to  
9 fight it out between them. It is saying the President  
10 has the exclusive authority.

11 GENERAL VERRILLI: Well, I -- I think in --  
12 in -- let me try to put it this way, Justice Ginsburg:  
13 In the absence of section 214, I think it would be clear  
14 from Pink and Belmont that this -- that the judgment on  
15 recognition is exclusively committed to the executive,  
16 and it would be a political question, if a party came in  
17 and said I want my passport to say something different  
18 about Jerusalem than it says, that --

19 JUSTICE SOTOMAYOR: General, the tension  
20 that I see here, and I think it's what Justice Breyer  
21 is getting at, is the label's important, because if we  
22 call this a political question and don't address the  
23 merits, the outcome is that the President is saying that  
24 he's entitled to ignore the Congress. I don't know what  
25 kind of message that sends, but it's a little unsettling

1 that a Court charged with enforcing the laws passed by  
2 Congress are basically saying we're not going to  
3 determine whether this law is constitutional or  
4 unconstitutional. That's what your definition of  
5 political question is becoming. And where does that  
6 stop?

7 GENERAL VERRILLI: Well, I --

8 JUSTICE SOTOMAYOR: In what situations?  
9 Only in foreign policy do we decide not to --

10 GENERAL VERRILLI: I think, Justice Sotomayor,  
11 it's actually quite narrow, and the problem isn't a  
12 significant one in the case of textual commitment,  
13 because the Court does -- in reaching the conclusion, as  
14 the D.C. Circuit did, that it's a political question,  
15 the Court does have to decide whether there is a textual  
16 commitment to the executive here. So, the Court would  
17 resolve that question. The Court would resolve the  
18 question of whether the conduct at issue here is within  
19 the scope of that textual commitment. So, the Court  
20 would issue those rulings.

21 CHIEF JUSTICE ROBERTS: And what you told --

22 JUSTICE SOTOMAYOR: But that's not what the  
23 D.C. Circuit did.

24 CHIEF JUSTICE ROBERTS: You told -- you told  
25 Justice Kagan that it didn't -- your position didn't

1 depend upon a textual commitment, that your position  
2 would be the same if the Receive Ambassadors Clause were  
3 not in the Constitution.

4 GENERAL VERRILLI: But I -- I didn't mean to  
5 suggest it wouldn't be a textual commitment. It would  
6 be -- it would be a commitment that one would read as  
7 the historical gloss on the vesting power, which is what  
8 Garamendi said.

9 CHIEF JUSTICE ROBERTS: That sounds to me  
10 like not in the text.

11 GENERAL VERRILLI: Well, I think it's the  
12 historical gloss on the vesting power. It is -- it  
13 functions as the equivalent of the specific textual  
14 commitment. Of course, we do have the specific textual  
15 commitment here, the --

16 JUSTICE SCALIA: This textual commitment  
17 applies when somebody comes to the Court and asks for  
18 the Court to make the decision. If the plaintiff here  
19 had come in and -- without a congressional statute to  
20 rely upon, and had said, it is -- it is wrong for the  
21 State Department not to let me say "Israel" on my  
22 passport, then we would say, you know, textually  
23 committed to the executive.

24 But this is a different situation where you  
25 have a -- a dispute between the two branches, and where



1 that happens, I find it hard to say, well, you know, we  
2 can't get into it because why? Because it's textually  
3 committed to one of the branches? It seems to me we  
4 have to resolve that question.

5           GENERAL VERRILLI: Well, as I said earlier  
6 or I tried to say, we think that the -- the analysis  
7 under the political question doctrine goes a very long  
8 way towards answering that question, Justice Scalia. We  
9 do think that this could be seen as a case like Gilligan,  
10 in which looking at the relief that the petitioner is  
11 seeking, the plaintiff is seeking, leads the Court to  
12 conclude that this -- that -- that entertaining the  
13 claim would embroil the Court in decisions that are  
14 supposed to be made by another branch; and that, in  
15 fact, I think you can understand section 214(d) as  
16 precisely that, an effort to try to draw the Court into  
17 this dispute between Congress and the executive over  
18 whether section -- over whether Jerusalem should be  
19 recognized as part of Israel.

20           CHIEF JUSTICE ROBERTS: I will give you a  
21 couple more minutes. If my colleagues have any  
22 questions?

23           JUSTICE SCALIA: Yes, I -- I wanted to  
24 follow up on that. Does -- does that mean you're  
25 content to have this Court not say whether it's the

1 exclusive executive power or -- or there's some  
2 congressional participation? I mean, if we just  
3 abstain, if we just say it's none of our business, it's  
4 none of our business; let you two guys fight it out --  
5 that's not what you're asking us to do, is it?

6 GENERAL VERRILLI: That's correct, Justice  
7 Scalia. It's not what we're asking --

8 JUSTICE SCALIA: You're asking us to decide  
9 the question that it is exclusively the presidential  
10 power.

11 GENERAL VERRILLI: Yes. That is correct.

12 JUSTICE SCALIA: That doesn't sound to me  
13 like -- you know, like abstaining because it's a  
14 political question. It seems to me like deciding the  
15 case.

16 CHIEF JUSTICE ROBERTS: Do you want to  
17 answer?

18 GENERAL VERRILLI: We -- we do think that  
19 the -- whether the Court is looking at it as a political  
20 question or whether the Court is looking at it as a  
21 judgment of the merits, the issue is textual commitment.  
22 This is -- there is textual commitment. This is a  
23 situation in which the country has to speak with one  
24 voice, and the executive has determined what the country  
25 should say.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Lewin, we'll give you 6 minutes.

4 REBUTTAL ARGUMENT OF NATHAN LEWIN

5 ON BEHALF OF THE PETITIONER

6 MR. LEWIN: Thank you, Mr. Chief Justice.

7 Let me begin my rebuttal by echoing really  
8 what Justice Alito said during my colleague's argument.  
9 The question is whether anything that the President  
10 thinks bears on recognition, it forecloses this Court or  
11 any court from making that determination?

12 This is not in our view a recognition case.  
13 This is a passport case. The question is, what goes on  
14 the passport, and may somebody self-identify? This  
15 is -- again, if one looks at the statute, if one even  
16 looks at the Foreign Affairs Manual, a passport is not  
17 today considered a diplomatic statement; it's an  
18 identification of a person in order to enable him to  
19 travel abroad.

20 Now, again, let me also echo what the Chief  
21 Justice and Justice Kagan asked during my colleague's  
22 argument. If in fact the statute had said we don't say  
23 Jerusalem is part of Israel, but you can identify  
24 yourself as being in Israel, my -- we submit that result  
25 can very easily be achieved and was achieved in the case

1 of Taiwan by a public statement by the executive.

2 Congress -- this law can be enacted. People  
3 who were born in Jerusalem can have their passport say  
4 either "Jerusalem" or "Israel." That's their choice.  
5 Congress hasn't said it has to say "Israel." And then  
6 the Department of State can issue, as it did in the case  
7 of Taiwan, a public statement saying this is not  
8 official American policy.

9 Nobody's asking this Court to decide what is  
10 official American policy. Nobody is asking the Court to  
11 decide what, as Justice Scalia said, would happen if  
12 there were no congressional statute. In that case, it  
13 would be a political question.

14 If my client had decided he wanted to have  
15 his passport say "Israel" and he had no congressional  
16 statute, and we brought the case to a court, the court  
17 could say, no, you're asking us to decide what the  
18 President should decide, what the Department of State  
19 should decide.

20 But other than that, Congress has enacted  
21 the law. The -- the fact is that with regard to this  
22 legislation, it is a statute which determines personal  
23 choice with regard to a passport. The case can be a  
24 vehicle -- this case can be a vehicle for an  
25 authoritative clarification of the roles of Congress and

1 the President in conducting the nation's foreign  
2 affairs. If so, then we submit Justice Jackson's  
3 statement, which acknowledges that Congress has the  
4 final word in the third category, is one that should  
5 control. But there are narrower grounds for enforcing  
6 section 214(d) that do not implicate separation of  
7 powers issues.

8           It's a passport law. It's within Congress's  
9 constitutional authority on the cases that have  
10 recognized that the President may not deny or restrict  
11 passports without the express or implied approval of  
12 Congress. That doesn't require the recognition or  
13 involve the recognition of foreign sovereigns.

14           And the State Department's justification for  
15 a policy that Congress has disapproved does not  
16 withstand scrutiny. The Court merely has to look at the  
17 record in this case in which the State Department has  
18 said, look, we're concerned that there may be a  
19 misperception of what this means. A misperception.

20           And it's extraordinary that on the basis of  
21 the fact that there's an alleged misperception, American  
22 citizens who have been authorized by Congress to say --  
23 identify themselves on their passports as being born in  
24 Israel will now find that statute nullified.

25           JUSTICE SOTOMAYOR: Could you tell me --

1 let's assume that a dozen nations said this designation  
2 on the passport is -- we view as an act of war; if the  
3 United States is going to do this, we're going to view  
4 it as an act of war. Would that then permit the  
5 President to ignore Congress's statute --

6 MR. LEWIN: I think Congress has to weigh  
7 that; and if Congress determines that in any event this  
8 is what the passport should say, then that is  
9 Congress --

10 JUSTICE SOTOMAYOR: So, it's not the  
11 misperception that's at issue.

12 MR. LEWIN: Well, in this case --

13 JUSTICE SOTOMAYOR: That misperception has  
14 nothing to do with your argument.

15 MR. LEWIN: I -- I don't think that's true  
16 because --

17 JUSTICE SOTOMAYOR: You're going back to  
18 Justice Scalia's point, which is what you're saying is  
19 Congress dictates foreign policy in the end.

20 MR. LEWIN: In the end, if Congress  
21 determines that what the President has said in this  
22 context is wrong, yes. We live in a system under which  
23 Congress passes the law, and the President has the  
24 duty -- and I think Justice Scalia has said it, has the  
25 duty to be the sole instrument of foreign policy. The

1 President speaks for the foreign policy that -- when  
2 Congress authorizes him to do it, he may formulate it.  
3 When Congress does not authorize him to do it, he may  
4 formulate it. But when Congress disapproves of what he  
5 does, then under Justice Jackson's test in the Steel  
6 Seizure case, Congress prevails.

7           The fact that there is dictum in cases --  
8 particularly Curtiss-Wright, which has not come up in  
9 the course of the argument, but Justice Sutherland's  
10 opinion in the Curtiss-Wright case in which he spoke  
11 broadly of the President as being the sole organ of  
12 foreign policy -- one has to say that the Harvard  
13 professor Thomas Reed Powell, who used to tell his  
14 students that just because Mr. -- Justice Sutherland  
15 writes clearly, you must not suppose that he thinks  
16 clearly.

17           (Laughter.)

18           MR. LEWIN: And we submit that is really  
19 what it is all about.

20           JUSTICE KENNEDY: I have just -- I have just  
21 one question on -- on Washington's recognition of  
22 revolutionary France. You cite in the reply brief the  
23 fact that the administration was simply following what  
24 it deemed to be a dictate of international law. Do you  
25 want us to infer from that that he was not exercising a

1 real discretion there?

2 MR. LEWIN: Correct. The -- historians  
3 who've studied that have determined that he was just  
4 following Mr. Vattel, who said you had have to recognize  
5 any country that has de facto control; and, therefore,  
6 since the French revolutionists were in de facto control  
7 of the French Government, Washington had no choice. He  
8 was not exercising any kind of discretion.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 MR. LEWIN: Thank you.

11 CHIEF JUSTICE ROBERTS: The case is  
12 submitted.

13 (Whereupon, at 11:06 a.m., the case in the  
14 above-entitled matter was submitted.)

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