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No. 13-628

In The
Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z.
and NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a federal statute that directs the Secretary of State, on request, to record the birthplace of an American citizen born in Jerusalem as born in "Israel" on a Consular Report of Birth Abroad and on a United States passport is unconstitutional on the ground that the statute "impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him."

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JOHN KERRY, SECRETARY OF STATE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. A, pp. 1a – 63a) is reported at 725 F.3d 197 (D.C. Cir. 2013). Earlier opinions of the Court of Appeals are reported at 571 F.3d 1227 (D.C. Cir. 2009), *rehearing en banc denied*, 610 F.3d 84 (D.C. Cir. 2010), *rev'd*, 132 S. Ct. 1421 (2011), and 444 F.3d 614 (D.C. Cir. 2006). The District Court's two opinions are reported at 511 F.

Supp. 2d 97 (D.D.C. 2007), and electronically at 2004 WL 5835212 (D.D.C. Sept. 7, 2004).

JURISDICTION

The Court of Appeals for the District of Columbia Circuit issued its opinion on July 23, 2013. On October 8, 2013, the Chief Justice extended the time for filing a petition for a writ of certiorari to November 20, 2013 (Pet. App. B, p. 64a). The petition for a writ of certiorari was filed on November 20, 2013, and was granted on April 21, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 214(d) of Public Law No. 107-228 provides as follows:

> **SEC. 214. UNITED STATES POLICY WITH RESPECT TO JERUSALEM AS THE CAPITAL OF ISRAEL**
>
> * * *
>
> (d) RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES. For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

STATEMENT OF FACTS

1. Petitioner and His Documentation

Petitioner was born at Shaare Zedek Hospital in Western Jerusalem on October 17, 2002. His parents, Ari Z. Zivotofsky and Naomi Siegman Zivotofsky, were born in the United States in September 1963 and June 1965, respectively. Pursuant to 8 U.S.C. § 1401(c), petitioner was a United States citizen at birth, having been born to parents who were both United States citizens at the time of his birth.

Petitioner's mother visited the United States Embassy in Tel Aviv on December 24, 2002. She applied for a passport and Consular Report of Birth Abroad ("CRBA") for her newborn son and requested that the place of birth on both documents be designated as "Israel."[1] Her requests were denied. Petitioner's passport and CRBA list only "Jerusalem" as his place of birth. JA 22-23. They do not include *any* country of birth.

2. State Department Policy

Rules regarding "Passport Preparation" appear in the State Department's Foreign Affairs Manual ("FAM") at 7 FAM 1380-1383. The relevant sections

---

[1] Her initial request was that the passport and CRBA read "Jerusalem, Israel." During the litigation, the request was modified to read only "Israel." The Court of Appeals accepted this modification in its first opinion. *Zivotofsky v. Secretary of State,* 444 F.3d 614, 616, n.1 (D.C. Cir. 2006).

of the Rules that were in effect in 2002 appear in the Joint Appendix ("JA") at pp. 109-149.

Section 1383.5-6 of the FAM relates specifically to Jerusalem. It reads as follows in both the 2002 and current versions (JA 115):

> **7 FAM 1383.5-6 Jerusalem**
> For applicants born before May 14, 1948 in a place that was within the municipal borders of Jerusalem, enter JERUSALEM as their place of birth. For persons born before May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, enter either PALESTINE or the name of the location (area/city) as it was known prior to annexation. For persons born after May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, it is acceptable to enter the name of the location (area/city) as it was known prior to annexation (*see* subsections 7 FAM 1383.5-4 and 7 FAM 1383.5-5).

A "birthplace transcription guide" appears as "Part II" of 7 FAM 1383 (JA 116-149). With regard to "JERUSALEM" the "guide" directs (JA 130):

> [Do not write Israel or Jordan. *See* sections 7 FAM 1383.5-5, 7 FAM 1383.5-6.]

Following "ISRAEL," the "guide" states (JA 129):

> [Does not include Jerusalem or areas under military occupation. *See* section 7 FAM 1383.5-5.]

It is undisputed that the State Department has followed the policy, applied in petitioner's case, of rejecting applicants' requests to designate "Israel" as the birthplace of United States citizens born in Jerusalem, even within Jerusalem's pre-1967 "municipal limits."[2]

3. The Statute

Section 214 of the Foreign Relations Authorization Act for Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002), relates, in the first three of its four subsections, to the location of the United States Embassy in Israel. Subsection (a)

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[2] The FAM notes that applicants "who were born in the area formerly known as Palestine and who give their birthplace as Palestine in their application have occasionally vehemently protested the policy of showing Israel, Jerusalem, or Jordan on the passport as their place of birth." 7 FAM 1383.5-4, JA 111-112.

After telling consular officers to "explain" to the applicant "the general policy of showing the birthplace as the country having present sovereignty," the FAM authorizes consular officers to "make exceptions to show Palestine as the birthplace in individual cases upon consideration of all the circumstances" for applicants born before 1948. Applicants with similar objections who were born after 1948 need not show "Israel" as their birthplace because Section 1383.5-4 declares that "the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty." JA 112.

"urges" the President "to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem" pursuant to the Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, 109 Stat. 398.

Subsection (d) is the only provision of Section 214 that is at issue in this case. It concerns whether a United States citizen's official documentation may indicate, on his request, that he is born in "Israel" if he is born anywhere in Jerusalem (including Western Jerusalem). The law directs the Secretary of State "upon the request of the citizen or the citizen's legal guardian, [to] record the place of birth as Israel."

When he signed the Act on September 30, 2002, President George W. Bush made the following statement regarding Section 214 in its entirety (without distinguishing between subsection (d) and the first three subsections), *Statement on Signing Foreign Relations Authorization Act,* Public Papers of the Presidents of the United States: George W. Bush (2002, Book II) 1697, 1698 (September 30, 2002):

> Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with

> the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.

4. The District Court Dismisses the Complaint

Petitioner's parents filed a complaint in the United States District Court for the District of Columbia on his behalf seeking an injunction, mandamus, and declaratory relief on September 16, 2003. JA 18-21. The government moved to dismiss the complaint, and petitioner cross-moved for summary judgment. JA 1 (Doc. Nos. 6 and 14).

On September 7, 2004, the district court issued a Memorandum Opinion granting the government's motion to dismiss on the grounds that (1) petitioner lacked constitutional standing because he suffered no "injury in fact" and (2) his complaint presented nonjusticiable political questions because it challenged the Executive Branch's exclusive authority to recognize foreign sovereigns. JA 28.

5. The First Dismissal Is Reversed

The court of appeals reversed. *Zivotofsky v. Secretary of State*, 444 F.3d 614 (D.C. Cir. 2006). It held that petitioner did have standing to maintain the action and remanded the case for discovery and the development of "a more complete record" on

which to decide the "political question" issue. 444 F.3d at 620.

6. Facts Established in Discovery

(a) The purpose of the "place-of-birth" designation

The government admitted, in response to petitioner's Requests for Admissions, that "United States citizens traveling in foreign countries are routinely identified in messages sent to and from the Department of State by (1) name, (2) date of birth, and (3) place of birth" (JA 41), and that "identification is the principal reason" that U.S. passports require "place of birth" (JA 42).[3]

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[3] The government responded to petitioner's Interrogatories Nos. 15 and 16 as follows (JA 69-70):

> United States citizens encountering emergencies in foreign countries are identified in cables sent to U.S. posts abroad by the Directorate for Overseas Citizens Services by their name, date, and place of birth.
>
> * * *
>
> The "place of birth" information contained in a passport of a U.S. citizen is included for identification purposes, among other reasons, in messages sent to and from U.S. embassies, consulates, and other posts.
>
> * * *
>
> The "place of birth" specification assists in identifying the individual, distinguishing that individual from other persons with similar names and/or dates of birth, and identifying fraudulent claimants attempting to use another person's identity. The information also facilitates retrieval of passport records to assist the Department in determining citizenship or notifying next of kin or other person designed by the individual to be notified in case of an emergency on the U.S. passport application. The date and place of birth fields are also used in the

(b) The number of U.S. passports affected

In response to Interrogatory No. 3, the government stated that it had issued 99,177 passports in a ten-year period that listed "Israel" as the holder's place of birth and 52,569 passports that listed "Jerusalem" as the holder's place of birth. JA 51.

(c) The history of the "place-of-birth" designation

An internal Passport Office Memorandum dated May 20, 1963, stated (JA 200; emphasis added):

> The passport used during World War I was the first in which the place of birth of the passport holder was included mandatorily *as a part of the identification of the bearer*. A search of the precedent files in the Passport Office Library did not bring to light any information as to why this was done, but it probably was a wartime travel control measure. The item was included in all subsequent revisions of the passport format, down to and including the present issuances.

Department of State American Citizens Services (ACS Plus) electronic case filing system.

Catherine Mary Barry, the Deputy Assistant Secretary of State for Overseas Citizens Services, testified as the State Department's designated representative in a Rule 30(b)(6) deposition. Her testimony was that place-of-birth is listed in a passport as "an element of identification." JA 78-79.

(d) Accommodation to individual requests

In March 1979 the Department announced that it had "changed its policy regarding the place of birth entry in U.S. passports" because "some persons have objected to showing the foreign country of birth." On this account, the Department directed that "U.S. citizens born abroad who object to showing the foreign country as place of birth may have only the city or town of birth written in their passports." JA - 216-217.

Instructions issued by the Office of Passport Services in May 1987 noted that "[f]or persons born outside the United States, the country of birth as it is known at the time of passport issuance is generally written. However, certain exceptions to this policy, as indicated in this Instruction, may be made *when there are objections to the country listing as established by the Department of State*." JA 219 (emphasis added). Authorizations to vary from the prescribed designation "if the applicant objects" are specified for "Palestine" (JA 223) and for the "former Canal Zone" (JA 224). Substitution of the city of birth was also permitted by the 1987 Instructions "when there are objections to the country listing as set forth in the Birthplace Guide." JA 225.

With respect to "Palestine," the 1987 Instructions stated that passport applicants "have occasionally objected to showing Israel or Jerusalem as their birthplace in the passport." Consular officers were instructed to "explain" the "general policy of showing the birthplace as the country having present sovereignty." If the applicant persisted in his or her

objection, an applicant born before 1948 could be shown as born in "Palestine" and someone born in 1948 or thereafter may be listed by the city or town of birth "if the applicant objects to showing the country having present sovereignty." JA 223. [4]

(e) Alleged adverse foreign-policy consequences

The State Department cited protests to the designation of a birthplace on a United States passport only when foreign governments objected to how they were identified. The Communist government in East Germany asked to be described in United States passports by its preferred title ("German Democratic Republic") rather than

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[4] Israel is the only country "having present sovereignty" to which this accommodation to the wishes of a person born in "Palestine" could apply. Hence the 1987 Instruction explicitly authorized persons born in Israel who did not want that country's name to be shown in their U.S. passports to avoid the "country having present sovereignty" even if, on the date of their birth, there was no question whatever that they were born within the State of Israel as internationally recognized.

Instructions issued in February 1993 authorized similar departures from the standard country listings of birthplaces whenever the applicant objected to the country listing. JA 173-176. Paras. 3D(7) ("Israel, Jerusalem, and Israeli-Occupied Areas"); 3D(8) ("Former Canal Zone"); 3D(9) ("City of Birth Listing"). The following new language was added to the Instruction (JA 173):

> Write ISRAEL as the place of birth in the passport if and only if the applicant was born in Israel itself (this does not include the Gaza Strip, the Golan Heights, Jerusalem, the West Bank or the No Man's Lands between the West Bank and Israel).

"Germany." The United States refused, for foreign-policy reasons, to accord it that requested designation. JA 87-89. The State Department cited no objection to the place-of-birth identification of any individual passport-holder.

(f) The Taiwan precedent

On October 25, 1994, President Clinton signed Pub. L. No. 103-415 (108 Stat. 4299) ("The State Department Authorization Technical Corrections Act of 1994"), which amended Pub. L. No. 103-236 and directed the Secretary of State to "permit" U.S. citizens born in Taiwan to list "Taiwan" as the place of birth on their U.S. passports or Consular Reports of Birth Abroad. Before and after enactment of that law it was official United States foreign policy not to recognize Taiwan as a foreign state. Prior to enactment of the 1994 legislation, the instruction issued on February 25, 1993, by the Passport Office with regard to "Birthplaces to be Written in Passports" specified that American citizens born in Taiwan were to be identified as born in "CHINA." *See* attachment to JA 169-177.

The State Department had taken the position that recording "Taiwan" on a United States passport was inconsistent with "the United States' one-China policy" and "would have a negative effect on our relations with the PRC and Taiwan." JA 178-179. The government of the People's Republic of China had refused to issue visas on American passports showing "Taiwan" as the place of birth. JA 180-181, 183-186.

State Department Cable 299832, sent on November 5, 1994, to all foreign posts stated that the change made by Congress' new law was to be "effective immediately." It added: "The U.S. recognizes the Government of the People's Republic of China as the sole legal government of China, and it acknowledges the Chinese position that there is only one China and Taiwan is part of China." JA 154. Other contemporaneous documents expressed the Department of State's acceptance of the Congressional legislation. JA 156-158, 159-166. The consulate in Taipei reported in November 1995 that, after the law was passed in 1994, approximately one-third of U.S. passport applicants chose to specify Taiwan as their place of birth and "some AmCits have indicated they are pleased to be able to list Taiwan." JA 191.

7. The District Court Again Dismisses the Complaint

On October 3, 2006, following discovery, petitioner filed a motion for summary judgment. JA 4 (Doc. No. 39). The government renewed its motion to dismiss and moved alternatively for summary judgment. JA 6 (Doc. No. 44). The district court did not hold a hearing on the motions but issued an order on September 19, 2007, granting the government's motion to dismiss on the ground that the court lacked subject-matter jurisdiction because the complaint "raises a quintessential political question which is not justiciable by the courts." JA 8 (Doc. No. 52).

8. The Court of Appeals Affirms the Second Dismissal

A majority of the court of appeals panel affirmed the district court's dismissal on the ground that the complaint "raises a nonjusticiable political question" so that the district court and the court of appeals were "[l]acking authority to consider the case." 571 F.3d 1227 (D.C. Cir. 2009). Senior Circuit Judge Edwards concurred in the result but issued a 13-page opinion expressing his view that "the political question doctrine has no application in this case." 571 F.3d at 1234.

9. This Court Reverses and Remands

Petitioner filed a petition for a writ of certiorari raising only the "political question" issue. This Court granted certiorari with an order that directed the parties also to brief whether Section 214(d) "impermissibly infringes the President's power to recognize foreign sovereigns." *Zivotofsky v. Clinton,* 131 S. Ct. 2897 (2011). On March 26, 2012, this Court held that the constitutionality of Section 214(d) is not a "political question" but rather an issue that "the Judiciary is competent to resolve." The Court then noted that decision of the constitutional issue is not "simple." The majority opinion summarized the arguments made by both sides and remanded the case for "the lower courts to consider the merits in the first instance" in light of "the textual, structural, and historical evidence . . . regarding the nature . . . of the passport and recognition powers." *Zivotofsky v. Clinton,* 132 S. Ct. 1421, 1430 (2012).

10. The Court of Appeals Affirms the Dismissal

Following briefing and oral argument, the court of appeals held that "the President ***exclusively*** holds the power to determine whether to recognize a foreign sovereign." 725 F.3d at 241 (emphasis added). The court found no "ratification-era evidence" giving the President exclusive authority to recognize foreign governments, but it concluded that "longstanding post-ratification practice supports the Secretary's position that the President exclusively holds the recognition power." 725 F.3d at 207. The court of appeals acknowledged that the issue of the President's exclusive power has never been decided by this Court, but, describing itself as "an inferior court," it treated as "authoritative" *dicta* in opinions of this Court stating that the Executive had exclusive recognition authority. 725 F.3d at 212.

The court of appeals also held that Section 214(d) was not a valid exercise of Congress' power to regulate passports because "it runs headlong into a carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem." 725 F.3d at 217. The court said it "was not equipped to second-guess the Executive regarding the foreign policy consequences of section 214(d)." 725 F.3d at 219. Circuit Judge Tatel issued a concurring opinion, noting that a court resolving the issues in this case is "in relatively uncharted waters with few fixed stars by which to navigate." 725 F.3d at 221.

INTRODUCTION

In our complex modern world, when the national interest often requires instantaneous response to dangers from abroad, Congress routinely assigns the lead in foreign relations to the President. Statutes give him great flexibility in dealing with international relations so that American interests in the world arena can be quickly and effectively implemented.

This is the unusual case in which, on a subject that calls for no emergency treatment, Congress decided that an Executive Branch policy implemented by Department of State bureaucrats for several decades was unjust and discriminatory. Congress overwhelmingly enacted a narrow law that gives approximately 50,000 American citizens born in Jerusalem the right to have their passports bear the same "place of birth" as American citizens born in Tel Aviv or Haifa. To these Americans, personal dignity and conscientious conviction calls on them to identify themselves as born in "Israel."

The government does not claim that the practical implementation of Section 214(d) will have any perceptible impact on American foreign policy. There are now approximately 100,000 U.S. passports that record their holders as having been born in Israel because they were born in cities like Tel Aviv and Haifa. If the 50,000 additional American citizens whose passports now read "Jerusalem" travel internationally with passports that say they are born in "Israel," America's foreign policy will not be impaired.

The government's only claim is that the publicity that accompanies the *change* in practice will be misperceived by Palestinians and the Arab world as an official change in America's position on the status of Jerusalem. The government cites public statements made when Congress enacted Section 214(d) as proof of this purported adverse foreign policy impact. This fear of unjustified and erroneous foreign misperception – apparently transitory when Congress enacted Section 214(d) – cannot be sufficient to nullify the considered judgment of Congress.

SUMMARY OF ARGUMENT

Section 214(d) is well within Congress' power to regulate the issuance and content of United States passports. Congress enacted a similar passport statute in 1994, when it permitted American citizens born in Taiwan to record Taiwan on their passports even though United States foreign policy recognized Taiwan as part of China. Congress has broad power over passports, and the State Department may not act without Congressional authority when it administers the issuance of passports. This Court has sustained Presidential authority over passports only when such authority is explicitly or implicitly authorized by Congress. If Congress fails to empower the President or, as in this case, disapproves the State Department's passport regulation, Congress prevails.

If this Court reaches the question whether the President has exclusive authority to recognize foreign sovereigns, the historical evidence overwhelmingly establishes that Presidential

recognition power is subject to laws enacted by Congress. Early judicial declarations assign the recognition power to the "legislative and executive departments." The earliest treatises on the United States Constitution recognize that although the President may initiate recognition, Congress has a "superior power" and it can "reverse" or "repudiate" the Executive decision.

Post-ratification history, beginning with the administrations of Presidents Adams and Jefferson and continuing to the McKinley administration, establish that the President does not have ***exclusive*** authority to recognize foreign governments. Indeed, Congress has, on occasion, enacted laws that recognize foreign governments

Opinions of this Court have contained *dicta* that the court of appeals felt obliged to follow in this case, but there are also *dicta* in other opinions that assign recognition authority to "the political branches" or to "the legislative and executive departments." Most significantly, none of the *dicta* in this Court's opinions relate to an instance such as this one, in which the President and the Congress disagree.

Under the "tripartite test" of Justice Jackson's concurrence in the *Steel Seizure Case*, frequently applied by this Court to determine Presidential authority, the President's power to deny the right conferred by Section 214(d) is at its "lowest ebb" because Congress disagrees with the President. Justification for such denial cannot pass the prescribed judicial "scrutiny" because the State Department cannot demonstrate a significant harm to foreign policy if it permits American citizens born

in Jerusalem to record their place of birth as "Israel."

ARGUMENT

I.

SECTION 214(d) IS APPROPRIATE PASSPORT LEGISLATION

A. The Title of the Statute and the Content of Its Other Subsections Do Not Impair the Constitutionality of Subsection (d).

This litigation concerns only subsection (d) of Section 214. It does not concern the enforcement of subsections (a), (b), or (c) – all of which pertain to the location of the United States Embassy in Israel. The constitutionality of subsection (d) must be determined separately from the constitutionality of other provisions of Section 214. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3161 (2010); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). On its face, subsection (d) addresses only how a place of birth is to be recorded on a passport or CRBA. It therefore falls squarely within Congress' power to regulate the issuance of passports.

To be sure, the title of Section 214 – "United States Policy With Respect to Jerusalem as the Capital of Israel" – sounds more in foreign policy than in passport regulation. Justices Alito and

Kagan questioned petitioner's counsel to this effect during the November 2011 oral argument. Transcript of Oral Argument, No. 10-699, November 7, 2011 (hereinafter "*Transcript*"), pp. 4, 17. But this Court's ruling in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), establishes that how Congress designates a duly enacted law does not control its constitutionality. The Court's majority opinion in *Sebelius* acknowledged that Congress had invoked its authority to regulate interstate commerce when it enacted the employer mandate provision of the Affordable Care Act, but, relying on the Court's "plain duty" to adopt a reading of a law "which will save the Act," the Court upheld the law as an exercise of Congress' taxing power. 132 S. Ct. at 2593, quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring).[5]

Congress has dealt frequently and repeatedly with the subject of passports, and this Court has consistently looked to Congress' legislation in resolving passport issues even when they affect significant foreign-policy concerns. The Thirty-

[5] The reference in this Court's majority opinion in *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013), to the title of the Defense of Marriage Act does not contradict our position. There is no separate subsection of DOMA that, like subsection (d) of Section 214, arguably exercises some independent Congressional authority. The dissenting Justices in *Windsor* did not, of course, join in the majority's reliance on the title of the Act. See 133 S. Ct. at 2696-2697 (Roberts, C.J.), 2708-2709 (Scalia, J.).

Fourth Congress enacted passport legislation in 1856 authorizing the Secretary of State "to grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the President shall designate and prescribe for and on behalf of the United States." 11 Stat. 52, 60-61 (1856). Another Passport Act was passed in 1926 by the Sixty-Ninth Congress. 44 Stat. 887.

Passport laws enacted since 1926 include the following: 8 U.S.C. § 1365b (biometric entry and exit data system), 8 U.S.C. § 1504 (cancellation of U.S. passports and consular reports of birth), 8 U.S.C. § 1732 (machine-readable, tamper-resistant entry and exit documents), 18 U.S.C. § 1542 (false statement in application and use of passport), 18 U.S.C. § 1543 (forgery or false use of passport), 18 U.S.C. § 1544 (misuse of passport), 22 U.S.C. § 212a (restriction of passports for sex tourism), 22 U.S.C. § 2705 (documentation of citizenship), 22 U.S.C. § 2714 (denial of passports to certain convicted drug traffickers), 22 U.S.C. § 2721 (impermissible basis for denial of passports), and 42 U.S.C. § 652(k) (denial of passports for nonpayment of child support).

B. The Taiwan Precedent Establishes That Congress' Passport Legislation May Be Implemented While Maintaining Foreign-Policy Recognition.

There is no meaningful difference between the 1994 experience with Taiwan (*see* pp. 12-13, *supra*) and the 2002 Congressional enactment of Section

214(d). If Taiwan could be recorded on a passport because the passport-holder's personal wishes were enacted into law by Congress, the same should hold true after the 2002 enactment that prescribed recording "Israel" for any Jerusalem-born citizen who requests it. The Department of State can issue a formal policy declaration, as it did when Congress enacted the Taiwan legislation in 1994, that will make it clear that United States foreign policy regarding Jerusalem has not changed.

C. This Court Has Consistently Limited the President's Power Regarding Passports to the Authority Conferred by Congressional Statute.

In *Zemel v. Rusk*, 381 U.S. 1 (1965), this Court permitted the President to impose passport travel restrictions only after it concluded that he was "*statutorily authorized* to refuse to validate passports of United States citizens for travel to Cuba." 381 U.S. at 3 (emphasis added). The Court found such authority in the 1926 Passport Act, citing the President's explicit invocation of the Act in 1938 (381 U.S. at 10) and in Congress' subsequent implicit approval of Presidential travel restrictions (381 U.S. at 12-23). Justice Black's dissent noted Congress' "ample power to enact legislation regulating the issuance and use of passports for travel abroad." 381 U.S. at 20. Justice Goldberg's dissent explicitly rejected the government's contention that the President possesses an "inherent Executive power" to restrict the validity of a passport. 381 U.S. at 28-30. Justice Black also rejected this argument, noting that "regulation of passports, just like regulation of

steel companies, is a law-making – not an executive, law-enforcing – function." 381 U.S. at 20.

Whether American citizens should be permitted to travel to foreign countries where they may be in danger and where our foreign policy discourages travel by American citizens is an aspect of foreign relations in which the Executive ordinarily takes a leading role. Yet this Court was not prepared in *Zemel v. Rusk* to give the President a free hand in implementing this aspect of his foreign policy. The Court majority approved of such authority only after it determined that Congress had implicitly acquiesced in the President's exercise of that power.

Haig v. Agee, 453 U.S. 280 (1981), permitted the Secretary of State to revoke the passport of a citizen who was causing serious damage to American foreign policy only because the Court majority determined that "*the statute authorizes* the action of the Secretary pursuant to the policy announced by the challenged regulation." 453 U.S. at 289 (emphasis added). The Executive Branch's action was not upheld by the Court because of any foreign-policy authority inherently held by the President. It was upheld because the history that the Court recounted (453 U.S. at 292-306) established that "Congress has approved it." 453 U.S. at 306.

Section 214(d) regulates the content of a passport, and its constitutionality is challenged only because the State Department asserts that Congress may not "interfere" with the President's authority over foreign policy. Had Congress prohibited the imposition of travel restrictions or had it failed to

give implicit approval for such restrictions, the *Zemel* opinion indicates that this Court would not have permitted the President to impose such restrictions unilaterally on the ground that Congress may not "interfere" with his conduct of foreign policy. This Court's decision in *Haig v. Agee* also indicates that if Congress prohibited revocation of the passport of a citizen whose actions injured U.S. foreign policy, the President would not be permitted to revoke passports on the grounds that such revocation was needed for foreign-policy reasons even if he asserted that limiting his authority would "interfere" with the conduct of American foreign policy.

The mere assertion by the State Department of such "interference" is, in the government's view, sufficient to override Congress' considered judgment. As Justice Alito observed during the November 2011 oral argument of this case, the government's position gives the President "plenary authority, unreviewable authority, with respect to *anything that the President thinks* has a bearing on the question of recognition." *Transcript*, p. 32 (emphasis added). The President asserted foreign-policy concerns to justify the passport policies he followed in *Zemel v. Rusk* and in *Haig v. Agee*, but this Court did not deem the President's bare assertion of a foreign-policy concern adequate to sustain his claimed authority. The President similarly may not, by simply *asserting* a foreign-policy concern, nullify Congress' directive in passport legislation.

D. The State Department's Place-of-Birth Rules Do Not Implement Any Rational Executive Policy Governing Recognition of Foreign Sovereigns.

The government has challenged Section 214(d) as interfering with the President's authority to recognize "foreign sovereigns." But the FAM does not limit authorized places of birth to "sovereigns" that the United States has formally recognized.

As noted at pp. 12-13 and 21-22, *supra*, the FAM authorizes "TAIWAN" to be listed as a "place of birth" although the United States does not recognize Taiwan's sovereignty. JA 150-154. In addition, applicable provisions of the FAM authorize designating "GAZA STRIP" or "WEST BANK" as a place of birth. JA 112-113. Neither the Gaza Strip nor the West Bank is a sovereign that the United States has ever recognized. Nor has "Palestine" ever been recognized as a sovereign by the United States. Yet the Foreign Affairs Manual declares, "PALESTINE is the alternate acceptable entry provided the applicant was born before 1948." JA 113. The mere inclusion of these locations as approved "place-of-birth" designations is not tantamount to formal United States recognition of sovereignty. As such, the President's asserted "recognition" determinations with which Section 214(d) allegedly "impermissibly interfere[s]" apparently are unrelated to United States recognition of actual foreign sovereigns.

Moreover, the State Department's announced practice of accommodating the prejudices of individual passport-holders in designating their

place of birth vitiates any claim that a national foreign policy regarding recognition of foreign sovereigns is at stake. The foreign policy of the United States indisputably recognizes Haifa as located in Israel. Why, then, may a Palestinian born in Haifa who "vehemently protests" reference to Israel (*see* note 2, *supra*) eradicate "Israel" from his passport? Compliance with that personal prejudice conflicts with the President's recognition of foreign sovereigns much more directly than permitting a citizen born in Jerusalem to identify himself as born in "Israel."

E. Congress Frequently Legislates in Areas That Affect Foreign Policy.

Nor is the validity of Congress' exercise of a constitutional power impugned because, in the view of the State Department, it may "interfere" with the President's achievement of foreign-policy objectives. Congress frequently and routinely legislates, pursuant to explicit constitutional authority, in areas that affect foreign nations. One example is immigration law. This Court recently observed that "[i]mmigration policy can affect trade, investment, tourism, *and diplomatic relations for the entire Nation* . . . ." *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (emphasis added). The Executive Branch has never refused to enforce a particular provision of Congress' immigration legislation on the ground that it "interferes with the President's constitutional authority to conduct the Nation's foreign affairs" – which is the reason stated by President Bush for refusing to enforce Section 214(d).

Congress also affects foreign policy through legislation by exercising its constitutional power to regulate foreign commerce and its appropriations power. Trade legislation, such as economic sanctions, may achieve foreign-policy goals abroad. Because "dollars often are policy," the appropriation of funds for foreign and defense programs has a significant impact on the foreign policy of the United States. *See* James M. Lindsay, *Congress and the Politics of U.S. Foreign Policy* (Johns Hopkins University Press 1994), pp. 84-88. The President surely may not disregard such legislation on the ground that it "interferes" with his conduct of the Nation's foreign policy.

II.

SECTION 214(d) DOES NOT INFRINGE UPON ANY EXCLUSIVE PRESIDENTIAL POWER

There is no "Recognition Clause" in the United States Constitution. The President is merely assigned the ceremonial duty of receiving foreign ambassadors. There is no evidence that the Constitution was originally understood as vesting any "recognition power" – and certainly not ***exclusive*** "recognition power" – in the Executive branch. Nor does post-ratification history support such a claim. The court of appeals erred in declaring that there is "longstanding and consistent post-ratification practice" of Presidents exercising or claiming ***exclusive*** power over recognition, or of Congress acquiescing in such a claim by the Executive. 725 F.3d at 208. Indeed, Congress exercised the recognition power through legislation in the early

days of the Republic, and it sometimes reversed Executive recognition policies. Presidents such as James Monroe, Andrew Jackson, Zachary Taylor, and Abraham Lincoln believed that they were not free, if Congress disagreed, to accord official recognition to foreign governments. The leading early treatises on the United States Constitution and opinions by Justices of this Court expressed the same view.

A. The Original Understanding of the "Receive Ambassadors Clause" Did Not Give the President Exclusive Authority To Recognize Foreign Sovereigns.

Article II, Section 3 of the Constitution declares that the President "shall receive Ambassadors and other public Ministers." The late Professor Louis Henkin noted that unlike the authority to appoint ambassadors, which is included among "Presidential powers," the authority to receive foreign ambassadors "seems to be couched rather as a duty, an 'assignment.'" Louis Henkin, *Foreign Affairs and the United States Constitution* 37-38 (2d ed., Oxford Univ. Press 1996) (1972).

In *The Federalist No. 69*, Alexander Hamilton characterized this Presidential prerogative as "more a matter of dignity than of authority," and called it "a circumstance which will be without consequence in the administration of the government." He explained that the President was assigned this task so that it would not be necessary to convene a house of Congress "upon every arrival of a foreign minister,

though it were merely to take the place of a departed predecessor." [6]

From his thorough study of the original understanding of the Founding Fathers. Professor Robert Reinstein concluded that the "Receive Ambassadors Clause" was not intended to confer on the President the authority to recognize foreign sovereigns – and surely not the ***exclusive*** authority to do so. Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 Univ. Rich. L. Rev. 801 (2011) (hereinafter "*Reinstein Original Understanding*"). He said, "[T]here is no originalist basis for the proposition that a plenary recognition power was vested in the President," and "[t]here is no recorded evidence that any of the participants in the drafting and ratifying of the Constitution – Federalists and Anti-Federalists alike – understood that any provision in the Constitution *vested* such a power in the presidency, and certainly not a power that is plenary in nature." *Reinstein Original Understanding* at 820, 862 (emphasis original).

The court of appeals accepted Professor Reinstein's appraisal of ratification-era evidence. It said, "[T]he Framers apparently were not concerned with how their young country recognized other

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[6]Hamilton modified his views in 1793. David Gray Adler, *The President's Recognition Power*, *in The Constitution And The Conduct Of American Foreign Policy* 133, 144-146 (Univ. of Kansas Press 1996). The *Federalist* discussion is, however, the best evidence of the original understanding of the draftsmen of the Constitution.

nations because the issue was not important to them at the time of ratification." 725 F.3d at 207.

Moreover, even if the Receive Ambassadors Clause created an implied "recognition power" in the President, it was not exclusive. Receiving ambassadors is only one means of recognizing a foreign government. Other methods require participation of the Senate (if done by treaty, *see Reinstein Original Understanding* at 820-838) or the appointment of diplomats to the foreign government (which also requires Senate approval). Congress has also exercised "recognition power" under its war and foreign-affairs authority. Each of these include implied non-exclusive recognition authority.

B. Chief Justice John Marshall's Opinion for the Full Supreme Court in 1818 and Later Decisions of This Court Have Described Shared "Recognition" Authority.

The State Department has, over the course of this litigation, repeatedly relied on language expressed by Chief Justice John Marshall when he was sitting by himself as a trial judge in a piracy case. In *United States v. Hutchings*, 26 F. Cas. 440, 442 (C.C.D. Va. 1817), Chief Justice Marshall said that the court could not accord recognition to the government of Buenos Ayres because "our executive had never recognized the independence of Buenos Ayres."

This was not, however, a considered ruling by Chief Justice Marshall that *only* the President has recognition authority. The following year the full Supreme Court decided *United States v. Palmer*, 16

U.S. 610 (1818), another piracy prosecution. The Court's certified holding in *Palmer* stated (16 U.S. at 643 (emphasis added)):

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

Chief Justice Marshall observed in *Palmer* that the "delicate and difficult" issues affecting recognition of a foreign government are "rather political than legal in their character" and that they "belong more properly to those who can declare what the law shall be" than to the courts. 16 U.S. at 634. This referred, as he explicitly noted, to both "the legislative and executive departments" – *i.e.*, to Congress and the President.[7]

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[7] The *Palmer* formulation was re-affirmed by this Court in *Jones v. United States*, 137 U.S. 202, 212 (1890) (emphasis added):

> Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political, question, the determination of which *by the legislative and executive* departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government.

C. The Constitutional-Law Treatises of Both William Rawle and Joseph Story Assigned the Recognition Power to both Congress and the President.

In 1825 and 1833 respectively, William Rawle and Joseph Story published their authoritative treatises on the Constitution of the United States. Chapter 20 of Rawle's "*A View of the Constitution of the United States of America,*" (Philip H. Nicklin 2d ed. 1829), p. 96, stated (emphasis added):

> The power of receiving foreign ambassadors, carries with it among other things, the right of judging in the case of a revolution in a foreign country, whether the new rulers ought to be recognised. *The legislature indeed possesses a superior power, and may declare its dissent from the executive recognition or refusal, but until that sense is declared, the act of the executive is binding.* The judicial power can take no notice of a new government, till one or the other of those two departments has acted on it.

In *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918), competing governments of Mexico sought recognition in United States courts. This Court said in *Oetjen* that "The conduct of foreign relations of our government is committed by the Constitution to the *executive and legislative* – 'the political' – departments of the government . . . ." 246 U.S. at 302 (emphasis added).

Joseph Story's "*Commentaries on the Constitution of the United States*" (Boston 1833), § 1560, declared (emphasis added):

> If such recognition is made, it is conclusive upon the nation, *unless indeed it can be reversed by an act of congress repudiating it.* If, on the other hand, such recognition has been refused by the executive, it is said, that *congress may, notwithstanding, solemnly acknowledge the sovereignty of the nation, or party.*

Justice Story's 1838 opinion as Circuit Justice in *Williams v. Suffolk Ins. Co.,* 29 F. Cas. 1402, 1404 (D. Mass. 1838), states that "it belongs exclusively to the executive department of our government to recognize, from time to time, any new governments, which may arise in the political revolutions of the world." The remainder of Justice Story's opinion, however, clearly demonstrates that he was considering *only* whether "this court, in its judicial character" could differ with a recognition decision rendered by the President, not whether Congress had authority to participate in determining whether to grant recognition.

Justice McLean's opinion for this Court affirming Justice Story's ruling (*Williams v. Suffolk Ins. Co.*, 38 U.S. 415 (1839)) described the issue before the Court as whether the President's decision regarding jurisdiction over the Falkland Islands was "conclusive on the judicial department." 38 U.S. at 420. The opinion declared that the President's denial

of Buenos Ayres' jurisdiction over the Falkland Islands "must be taken and *acted upon by this Court* as thus asserted and maintained." *Id.* (emphasis added). The case did not concern disagreement between Congress and the President on a recognition issue

D. Post-Ratification History Does Not Support the Existence of an Exclusive Executive Recognition Power.

The court of appeals erroneously concluded that "longstanding post-ratification practice supports the Secretary's position that the President exclusively holds the recognition power." 725 F.3d at 207. The court's historical survey was incomplete. It omitted instances in which Congress had exercised its recognition power, and the court's analysis of historical events was contextually inaccurate. The post-ratification history establishes that neither President nor Congress believed that the President's "recognition power" was beyond legislative control by Congress.

(1) Washington and Post-Revolutionary France

The court of appeals mistakenly accorded great weight to President Washington's unilateral acceptance of Edmond Genet, the minister sent by France's post-revolutionary government. Its opinion states that this constituted recognition of "a new government by implication." 725 F.3d at 208.

President Washington's multiple recognitions of French revolutionary governments and other

unilateral actions he took during the Neutrality Crisis were not, however, discretionary foreign-policy judgments. They were mandated by the Washington administration's well-documented fealty to the law of nations. *See* Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. Rich. L. Rev. 373, 375-79, 398-409 (2012) (hereinafter "*Reinstein Washington*"); *see also* Edwin D. Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 Am. J. Int'l L. 239 (1932); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932 (2010).

Scholars agree that the Washington administration adopted the doctrine of *de facto* recognition articulated by political philosopher Emmerich de Vattel — the principle that "every government had the duty to recognize and receive foreign ministers from any government that was in 'actual possession' of the instruments of national power." Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 Temp. L. Rev. 1, 11 (2013) (hereinafter "*Reinstein Recognition Power*"); *see also Reinstein Washington* at 424; David Gray Adler, *The President's Recognition Power, in The Constitution and the Conduct of American Foreign Policy* 133, 138-49 (David Gray Adler & Larry N. George eds., 1996).

Recognitions of the post-revolutionary French governments in late 1792 and early 1793 were guided not by a belief in the Executive's exclusive

authority to make such discretionary decisions, but rather by the conviction that the United States was duty-bound by the law of nations to recognize the sovereignty of any foreign government that was in control of its claimed territory. President Washington never claimed that his power to recognize foreign governments was exclusive, or that it was superior to the legislative power of Congress. While the President was bound by the law of nations, Congress could – and did – enact legislation that overrode the law of nations. *Reinstein Recognition Power* at 12-14 & n.66.[8]

Moreover, with the lone exception of France's embryonic revolutionary government, no nation or government sought recognition from the United States during the Washington administration. Congress failed to instruct President Washington on which countries to recognize not because Congress

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[8] In a statement that had been pre-approved by President Washington, Secretary of State Thomas Jefferson explained the decision to recognize one revolutionary French government by invoking Vattel's mandatory doctrine of *de facto* recognition. Jefferson to Gouverneur Morris, Minister to France (March 12, 1793), *in* 25 *The Papers of Thomas Jefferson* 367 (John Catanzariti et al. eds. 1995) ("*Jefferson Papers*"):

> We surely cannot deny to any nation that right where on our own government is founded, that every one may govern itself according to whatever form it pleases, and change these forms at its own will: and that it may transact its business with foreign nations through whatever organ it thinks proper, whether king, convention, assembly, committee, president or any thing else it may chuse. The will of the nation is the only thing essential to be regarded.

acknowledged that recognition is exclusively the purview of the Executive, but because the Western community of nations had little or no interest in American recognition. "[T]he idea that European nations needed recognition by the United States is fanciful." *Reinstein Recognition Power* at 9.

The Washington administration's alleged "sole control" over the issuance of exequaturs, which were "licenses to foreign consuls allowing them to represent their countries in the United States," is, contrary to the court of appeals' view, not proof of any exclusive recognition authority. "[I]t appears that all foreign consuls who sought and received exequaturs during the Washington administration represented countries with which the United States had [pre-existing] diplomatic relations or treaties." *Reinstein Recognition Power* at 10. The Washington administration's issuance of these documents was a purely ministerial function bereft of any genuine political import.

(2) Adams & Jefferson – Santon Domingo & Haiti

The court of appeals' opinion skips over the administrations of the second and third Presidents. Neither President Adams nor President Jefferson claimed an exclusive "recognition power." But during both administrations Congress exercised that power.

(a) Santo Domingo – In 1800 Congress resolved the status of Santo Domingo – the eastern portion of the island of Hispaniola, now the Dominican Republic – by declaring that it was a colony of France. Robert J. Reinstein, Slavery, *Executive*

Power and International Law: The Haitian Revolution and American Constitutionalism, 53 Am. J. Legal Hist. 141, 161-65 (2013) (hereinafter "*Reinstein Haiti*"). Spain, which had previously controlled Santo Domingo, agreed by treaty to cede that territory to France, but then continued to govern it. The western portion of Hispaniola, known then as St. Domingue (now Haiti), was a French colony under the autonomous control of an insurgent native government led by Toussaint Louverture. *Reinstein Recognition Power* at 14-15.

Congress enacted non-intercourse laws prohibiting Americans from trading with France or its territories. Act of June 13, 1798, ch. 53, 1 Stat. 565, 565. The following year, Congress re-enacted those laws with a provision, known as "Toussaint's Clause," which effectively permitted the President to issue an order allowing Americans to trade with St. Domingue and thereby support the Louverture government. President Adams accepted Congress' invitation and invoked "Toussaint's Clause" to open trade with the St. Domingue ports that were under Louverture's control.

Louverture had seized control of certain ports in Santo Domingo, giving rise to the question whether Santo Domingo was French territory subject to the non-intercourse laws and "Toussaint's Clause." Congress declared in 1800, in re-enacting the non-intercourse laws, that "the whole of the island of Hispaniola shall for the purposes of this act be considered as a dependency of the French Republic." Act of Feb. 27, 1800, ch. 10, § 7, 2 Stat. 7, 10. This

legislation was a unilateral Congressional recognition of a foreign sovereign.

(b) Haiti – The court of appeals' recitation also omitted an 1806 law that rejected Haiti's claim to independence – a law that Supreme Court Justice Bushrod Washington ultimately described as "a clear acknowledgment of the sovereignty of France over the island." *Clark v. United States*, 5 F. Cas. 932, 932-33 (C.C.D. Pa. 1811).

After a 13-year struggle that culminated with a defeat of French military forces, the natives of St. Domingue in 1804 declared their independence from France as the new republic of Haiti. *See generally* Laurent DuBois, *Avengers of the New World: The Story of the Haitian Revolution* (2004). France continued to claim full sovereignty over the island, and threatened a reinvasion. Letter from U.S. Minister Robert R. Livingston to Secretary of State James Madison (May 3, 1804), in 7 *The Papers of James Madison* 131, 136 (David B. Mattern et al. eds., 2005).

President Jefferson adopted a policy of continuing to recognize French sovereignty over St. Domingue, but not prohibiting American trade with Haiti. *See* Letter from Secretary of State James Madison to U.S. Minister Robert R. Livingston (Jan. 31, 1804), in 6 *The Papers of James Madison* 406, 411 (Mary A. Hackett ed., 2002). Jefferson imposed this policy despite French protests that America's ongoing trade with Haiti constituted a violation of French sovereignty over the island. *See* Letter from Pichon to Madison (May 7, 1804), in 7 *The Papers of*

James Madison, Secretary of State Series 185, 188 (Dowdy ed., 1986). French protests of the U.S. policy grew louder, and Congress passed the 1806 Haitian non-intercourse act, which prohibited all commerce with "any person or persons resident within any part of the island of St. Domingo, not in possession, and under the acknowledged government of France . . . ." Act of Feb. 28, 1806, ch. 9, § 1, 2 Stat. 351, 351. After reenacting the law in 1807 (Act of Feb. 24, 1807, ch. 17, § 1, 2 Stat. 421, 421-22), Congress replaced the statute two years later with a broader non-intercourse law that applied, *inter alia*, to all French colonies and dependencies. Act of Mar. 1, 1809, ch. 24, 2 Stat. 528, 528-33.

In October 1809 United States authorities seized goods that an American merchant named Clark imported from Haiti. Clark sued for return of his cargo, arguing that the 1809 non-intercourse law did not apply to Haiti because Haiti was independent of France under the law of nations, notwithstanding the fact that France still claimed sovereignty over it. *Clark v. United States*, 5 F. Cas. 932 (C.C.D. Pa. 1811). Supreme Court Justice Bushrod Washington, sitting on circuit, held that even though Haiti had indeed achieved *de facto* independence under the law of nations, the court was bound to apply Congress' 1806 law. Justice Washington concluded (5 F. Cas. at 934) (emphasis added):

> We view the law of 1806, under the circumstances which produced it, *as a clear acknowledgement of the sovereignty of France over the island,* which no subsequent act of our

> government, has in any respect impaired. [. . .] So that the government has not only not acknowledged the independence of this island, but has very plainly declared the contrary.

Justice Washington did not look to the position of the Executive branch, but rather began and ended his analysis with the 1806 Congressional enactment. He said, "The court is called upon to construe an act of congress, and to say, whether, within the meaning of the legislature, this island was to be considered as a dependence of France." 5 F. Cas. at 933.

(3) Monroe and Latin America

In 1816, the United Provinces of Rio de la Plata declared independence from Spain. President Monroe then asked his Cabinet whether the Executive possessed "power to acknowledge the independence of new States whose independence has not been acknowledged by the parent country, and between which parties a war actually exists on that account?" James Monroe to the Members of the Cabinet (October 15, 1817), *in* 6 *The Writings of James Monroe* 31 (Stanislaus M. Hamilton ed. 1969).

Representative Henry Clay announced in December 1817 that he intended to introduce a resolution moving the recognition of Buenos Ayres. Secretary of State John Quincy Adams then expressed his own personal view that the President's recognition authority was exclusive. Clay proceeded to introduce a bill that would have appropriated funds for a minister to be sent from the United

States to the de la Plata provinces, but Clay's bill failed to pass. 32 Annals of Cong. 1468-1469 (1818).

In 1819, American and Spanish negotiators signed a treaty in which Spain ceded Florida to the United States. Although the Senate approved the treaty, Spain did not. The Spanish minister insisted that, as a condition for ratification, the United States make a commitment not to recognize the new republics.

In April 1820, Clay renewed his motion to appropriate funds to send a minister to the countries in Latin America that had established their independence. This time, Clay's motion was passed in the House by a narrow vote. 36 Annals of Cong. 1781-1782 (1820).

On February 22, 1821, Spain ratified the Florida treaty, thereby removing the major political barrier to recognition of the new republics. Instead of unilaterally recognizing them – as he could have done if he had agreed with John Quincy Adams' personal view that the President possessed this power exclusively – President Monroe sent a message to Congress urging Congress to act jointly with him in granting recognition because the republics had, *de facto*, secured their independence. To the Senate and House of Representatives of the United States (March 8, 1822), *in Writings of James Monroe*, *supra*, at 207-211. Congress then enacted legislation appropriating $100,000 to fund diplomatic missions to the "independent nations of the American continent." Samuel Flagg Bemis, *The Latin American Policy of the United States: An*

Historical Interpretation 200-201 (1943) (hereinafter "*Bemis*").

The court of appeals' opinion emphasizes the fact that Monroe's Congressional supporters blocked the recognition legislation that Clay had introduced. 725 F.3d at 208. The opinion does not acknowledge that its characterization of the opposition to Clay is a subject of significant dispute among leading scholars of American history.

Legal historian Julius Goebel, Jr., interpreted the failure of Clay's legislation as evidence of widespread Congressional support for an exclusive Executive recognition power. Goebel's view is disputed by two Pulitzer Prize-winning historians, Frederic Paxson and Samuel Flagg Bemis, both of whom attribute the failure of Clay's legislation to foreign policy considerations and partisan politics. *Bemis* at 36-47; Frederic L. Paxson, *The Independence of the South American Republics: A Study in Recognition and Foreign Policy* 174 (2d ed. 1916) (1903) (hereinafter "*Paxson*").

To be sure, some Congressmen – like Representative Alexander Smyth of Virginia – voted against Clay's initiative because they believed that recognition was the exclusive province of the Executive. 725 F.3d at 208. But others in the House considered (i) whether the revolutionary governments had fully wrested control from Spain and the potentially violent consequences of

premature recognition,[9] and (ii) whether Clay's motion was in fact a thinly-veiled personal political attack on President Monroe, who had failed to appoint Clay as secretary of state and had instead nominated John Quincy Adams, who Clay personally despised.[10] *Reinstein Recognition Power* at 19-26.

In 1822, when the dust finally settled in Latin America and stable governments had been established in the new states, President Monroe did not take unilateral recognition action. Instead he reported the situation to Congress and stated that the provinces that had declared their independence "ought to be recognized" under the law of nations. He added that if Congress "entertain[ed] similar sentiments, there may be such cooperation between the two departments of the Government as their

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[9] Representative John Forsyth, Chairman of the House Committee on Foreign Affairs and one of the Monroe administration's principal allies, emphasized the law of nations given that he viewed the civil war between the Spain and the insurgents to be unresolved (32 *Annals of Cong.* 1505-1506, 1509, 1511-1512, 1517-1522 (1818)), and feared that premature recognition of the revolutionary republics could lead to war with Spain. *Id.* at 1503-1505, 1518.

[10] 32 *Annals of Cong.* 1600-1601 (statement of Rep. Hugh Nelson); *id.* at 1634-1635 (statement of Rep. John Forsyth challenging Clay's motives); *Bemis* at 40 (stating that this was Clay's true motive); *Paxson* at 127-129 (stating that Clay's recognition motions might have stemmed from his anger at John Quincy Adams's appointment as Secretary of State); David S. Heidler & Jeanne T. Heidler, *Henry Clay: The Essential American* 129, 133-134, 136 (2010) (describing genesis of the rift between Clay and Monroe, Clay's dislike of Adams, and the popular belief that Clay's recognition motions were an attempt to attack and embarrass Monroe).

respective rights and duties may require." James Monroe, To the Senate and House of Representatives of the United States (Mar. 8, 1822), in *Writings of James Monroe*, at 207-211. Congress responded by enacting an appropriations act providing for official missions to each of the newly independent nations. Act of May 4, 1822, ch. 52, 3 Stat. 678, 678. President Monroe then officially recognized the new Latin American states. *Bemis* at 46-47.[11]

(4) Jackson and Texas

When recognition of the Republic of Texas was in issue, the Congress and the President openly disagreed. In the end, it was President Jackson who blinked while Congress got its way. The court of appeals' opinion attempts to minimize this historical narrative (725 F.3d at 210), but a detailed account provides compelling evidence that President Jackson did not believe that the Executive branch had exclusive recognition power.

The inhabitants of Texas defeated an invading Mexican army in 1836-1837 and established an independent republic. They requested American recognition of the Republic of Texas. President Andrew Jackson advocated neutrality, asserting that under the law of nations recognition of Texas' independence from Mexico was not yet appropriate because it was uncertain whether Texas would be able to repel a second invasion that Mexico was

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[11] The 1822 legislation covered Brazil, which President Monroe recognized in 1825. He was not, therefore, exercising an ***exclusive*** recognition power in recognizing Brazil.

threatening. In addition, he feared that, because Texas also requested annexation, recognition would be viewed by Mexico as an act of aggression by the United States. Andrew Jackson, To the Senate and House of Representatives of the United States (Dec. 21, 1836), in 3 *A Compilation of the Messages and Papers of the Presidents 1789-1908*, at 265-69 (hereinafter "*Jackson on Texas*").

Congress disagreed with Jackson. Both Houses of Congress resolved that the independence of Texas should be recognized "whenever satisfactory information shall be received that it has in successful operation a civil Government capable of performing the duties and fulfilling the obligations of an independent Power." Cong. Globe, 24th Cong., 1st Sess. 453, 479, 486 (1836).

Jackson did not claim any exclusive Executive authority over recognition. To the contrary, he avoided taking a position on the issue now before this Court. He said (*Jackson on Texas* at 267): [12]

> Nor has any deliberate inquiry ever been instituted in Congress or in any of our legislative bodies as to whom belonged the power of originally recognizing a new State –a power the exercise of which is equivalent under some circumstances to a declaration of war; a power nowhere expressly

[12] Jackson's secretary of state was John Forsyth, who had been one of the leading Monroe allies in the debate over Clay's proposed legislation to recognize the Latin American republics.

> delegated, and only granted in the Constitution as it is necessarily involved in some of the great powers given to Congress, in that given to the President and Senate to form treaties with foreign powers and to appoint ambassadors and other public ministers, and in that conferred upon the President to receive ministers from foreign nations.

Jackson then said that it was unnecessary to resolve this constitutional issue because the prudent course was for Congress and the Executive to work together. He followed with his own opinion that the recognition of Texas was premature, but if Congress disagreed, "I shall promptly and cordially unite with you." *Id.* at 269.

The court of appeals' opinion notes that Jackson stated that he was acquiescing to Congress "on the ground of expediency," and it concludes, based on this term, that in agreeing to recognize Texas "Jackson merely enlisted the support of the Congress as a matter of political prudence." 725 F.3d at 210. Jackson's own explanation, however, invoked the "spirit of the Constitution" and Congress' war powers, thereby contradicting the conclusion that he acted out of "political prudence." *Jackson on Texas* at 267.

The House passed a resolution on February 28, 1837, appropriating funds for a diplomatic envoy to Texas whenever the President "may receive satisfactory evidence that Texas is an independent

power, and shall deem it expedient to appoint such a minister." Cong. Globe, 24th Cong., 2nd Sess. 194 (1837). On the following day, the Senate approved the appropriation of funds and passed a more strongly worded resolution (*id.* at 83, 214):

> Resolved, That the State of Texas having established and maintained an independent Government, capable of performing those duties, foreign and domestic, which appertain to independent Governments, and it appearing that there is no longer any reasonable prospect of the successful prosecution of the war by Mexico against said State, it is expedient and proper, and in perfect conformity with the laws of nations, and the practice of this Government in like cases, that the independent political existence of said State be acknowledged by the Government of the United States.

On his last day in office, President Jackson completed the recognition of Texas by reciting the resolutions passed by the House and Senate and concluding that he now had a "duty" to join in recognizing Texas: "Regarding these proceedings as a virtual decision of the question submitted by me to Congress, *I think it my duty to acquiesce therein*, and therefore I nominate Alcee La Branche, of Louisiana, to be charge d'affaires to the Republic of Texas." Andrew Jackson, *Message to the Senate* (March 3, 1837) (emphasis added), *in* 3 *Andrew Jackson: A Compilation of the Messages and Papers*

of the Presidents, at 366 (James D. Richardson ed. 2004).

(5) Taylor and Hungary

A revolution seeking to replace Austria's monarchical rule with an independent republic erupted in Hungary in 1848. Under instructions from President Taylor, A. Dudley Mann was appointed as a special agent to Hungary. Secretary of State Clayton wrote to Mann on June 18, 1849: "If it shall appear that Hungary is able to maintain the independence she has declared, we desire to be the very first to congratulate her, and to hail, with a hearty welcome her entrance into the family of nations." Letter from Clayton to Mann (June 18, 1849), S. Exec. Doc. No. 31-43, at 3 (1850). Clayton's instructions to Mann, apparently approved by President Taylor, continued with the following observations manifesting the Executive branch's view that Congress had recognition power (*id.* at 5-6; emphasis added):

> Should the new government prove to be, in your opinion, firm and stable, *the President will cheerfully recommend to Congress, at their next session, the recognition of Hungary*; and you might intimate, if you should see fit, that the President would, in that event, be gratified to receive a diplomat agent from Hungary in the United States, by or before the next meeting of Congress; and that he entertains no doubt whatever that, in case her new

> government should prove to be firm and stable, *her independence would be speedily recognized by that enlightened body.*

The Hungarian revolution failed, but this exchange leaves little doubt that President Taylor's administration viewed recognition power as residing with Congress, and not exclusively with the President.

(6) Lincoln and Haiti and Liberia

Because of the combustible issues of race and slavery, neither Haiti nor Liberia was recognized by the United States before the Civil War. In his first message to Congress, President Lincoln urged the recognition of both nations. *Lincoln's First Annual Message to Congress* (Dec. 3, 1861), *in* 6 *A Compilation of Messages and Papers of the Presidents*:

> If any good reason exists why we should persevere longer in withholding our recognition of the independence and sovereignty of Hayti and Liberia, I am unable to discern it. Unwilling, however, to inaugurate a novel policy in regard to them without the approbation of Congress, I submit for your consideration the expediency of an appropriation for maintaining a charge d'affaires near each of these new States.

Congress then enacted a statute recognizing Haiti and Liberia and authorizing the President to appoint diplomatic representatives to Haiti and Liberia. Cong. Globe, 32nd Cong. 2nd Sess. 1814-1815 (April 24, 1862) (Senate); *id.* at 2536 (June 3, 1862) (House). This was followed by an exchange of diplomats and the negotiation of commercial treaties with the two nations. *See* Gordon S. Brown, *Touissaint's Clause: The Founding Fathers and the Haitian Revolution* 235 (2005); Rayford W. Logan, *The Diplomatic Relations of the United States with Haiti* 152 (1941); Tim Matthewson, *A Proslavery Foreign Policy: Haitian-American Relations During the Early Republic* 120-32 (2003).

The court of appeals' opinion asserts that Congress was not exercising recognition power but was merely acceding to the Presidential action by appropriating funds for diplomatic representatives. 725 F.3d at 210. This ignores the language of the statute. It expressly recognized Haiti and Liberia as independent republics and "authorized" the appointment of "diplomatic representatives of the United States to the Republics of Hayti and Liberia, respectively." Congressman Gooch, chairman of the House Committee on Foreign Affairs, introduced the bill with the following statement: "This bill, Mr. Speaker, *provides for the recognition by this Government* of the independence, and the establishment of diplomatic relations with them." Cong. Globe, 37th Cong., 2d Sess. 2498 (1862) (emphasis added).

During debate on the bill it was openly acknowledged that the contemplated legislation

would actually have the effect of recognizing Haiti and Liberia as independent nations. *See, e.g.*, *id.* at 1806 (statement of Sen. Garrett Davis) ("I have not the least objection to the recognition by our Government of the existence of those two republics as independent Powers, and I have no objection to any extent of commercial relations between our country and those two republics."); *id.* (statement of Rep. Thomas Eliot) ("The recognition of Haytien independence is among the duties to be discharged by the present Congress, as an act both of justice and of policy. A bill similar in its provisions to the bill now before the House should have become a law many years ago.").

(7) Lincoln and Mexico

Shortly after the Civil War broke out, Great Britain, Spain and France sent troops into Mexico to collect on debts they were allegedly owed. Britain and Spain reached agreements with the Mexican government, but France sent additional troops to Mexico and started a war. By June 1863, France had captured Mexico City and installed Maximilian of Austria as emperor. J.G. Randall & David Donald, *The Civil War and Reconstruction* 510-12 (2d ed. 1969) (hereinafter "*Randall & Donald*").

Lincoln's secretary of state, William Seward, protested France's actions, but the Lincoln administration feared that France might be incited to retaliate against Lincoln by recognizing the Confederacy's independence. Samuel Flagg Bemis, *A Diplomatic History of the United States*, pp. 372-373, 393 (4th ed. 1955); *Randall & Donald* at 512.

The House of Representatives, however, unanimously passed a resolution condemning France's actions in Mexico as "deplorable" and declaring that it would be antithetical to U.S. policy to recognize "any monarchical Government erected on the ruins of any republican government in America under the auspices of any European Power." Cong. Globe, 38th Cong., 1st Sess. 1408 (1864).

The French Minister for Foreign Affairs then confronted William Dayton, the U.S. Minister to France, and asked, "Do you bring us peace or bring us war?" *Id.* at 2475 (letter from Dayton to Seward, Apr. 22, 1864). Seward directed Dayton to pacify the French government by explaining that recognition of a foreign government "is a practical and purely executive question, and the decision of it belongs not to the House of Representatives, or even to Congress, but to the President of the United States." *Id.* (letter from Seward to Dayton, April 7, 1864). Dayton was instructed to state that the Lincoln administration had not changed its policy of neutrality. *Id.*

Seward's correspondence with Dayton was subsequently provided to Congress. The House went on record with a resolution asserting that "Congress has a Constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States . . . and it is the Constitutional duty of the executive department to respect that policy, not less in diplomatic negotiations than in the use of national forces when authorized by law . . . ." Cong. Globe, 38th Cong., 2d Sess. 65-67 (1864). The Senate Foreign Relations Committee did not bring the original House resolution regarding Mexico to the

floor. Senator Sumner, chairman of the committee, declared that it would be "madness" to pass it because of the potentially disastrous consequences. Cong. Globe, 37th Cong., 3d Sess. 694-95, 704 (1863). Neither he nor any other Senator suggested that the President had exclusive recognition authority.

This was not, as the court of appeals conjectured, an instance in which Congress yielded to Seward's "challenge." 725 F.3d at 208. Two years earlier, in the recognition of Haiti and Liberia, Congress had vigorously articulated its own authority. *See* p. 52, *supra*. Given the contemporaneous circumstances, in 1863 it chose prudence over recklessness.

(8) McKinley and Cuba

On April 11, 1898, President McKinley requested that Congress authorize him to use American military forces in Cuba to establish "a stable government, capable of maintaining order and observing its international obligations." 31 Cong. Rec. 3699-3702 (1898). McKinley refused to recognize Cuban independence from Spanish rule. Quoting President Jackson's letter on Texas, he asserted that such recognition would be improper under the law of nations. *Id.* at 3700-3701.

Two days later, the House Committee on Foreign Affairs introduced a proposed joint resolution that was consistent with McKinley's message. *Id.* at 3810. An amendment that would have explicitly recognized the "Republic of Cuba" (which was the insurgent government leading the rebellion against Spain) was defeated on grounds that such

recognition was inappropriate under the law of nations. *Id.* at 3818-3819. On the same day, the Senate Committee on Foreign Relations proposed a joint resolution that declared that "the people of the Island of Cuba are, and of right ought to be, free and independent, and that the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful Government of that island." *Id.* at 3993.

The Senate and House compromised by deleting language recognizing the insurgent government (called the "Republic of Cuba"), but the resolution retained a clause recognizing Cuban independence from Spain. *Id.* at 4040-4041. Some legislators voiced concern that this constituted an impermissible usurpation of the Executive's recognition power, but the majority voted for the resolution. *Id.* at 4033. President McKinley signed the resolution into law even though it reversed his policy of refusing to recognize Cuban independence from Spain. Act of Apr. 20, 1898, ch. 24, 30 Stat. 738 (1898). The final version of the joint resolution was titled "Joint Resolution [f]or the recognition of the independence of the people of Cuba," and the first resolution was "that the people of the Island of Cuba are, and of right ought to be, free and independent."

Contrary to the suggestion of the court of appeals (725 F.3d at 208-209), this was far from an instance of Congressional acquiescence to an exclusive Presidential power to recognize foreign sovereigns. In fact, employing the language of the Declaration of Independence, Congress legislatively recognized the independence of the Cuban people from Spanish

colonial rule and overruled President McKinley's contrary recognition policy.

(9) Summary of Post-Ratification History

The post-ratification history of the recognition power, summarized in the chart on the following page, establishes that Congress engaged in legislative recognition of foreign governments and participated in the recognition process. This history refutes the State Department's assertion, adopted by the court below, that the Executive has "exclusive" recognition authority. History supports Professor Reinstein's conclusion that the President's recognition power is not "plenary," and that "executive recognition decisions are not exclusive but are subject to laws enacted by Congress." *Reinstein Recognition Power* at 60.

Year/ Sovereign	**President (Congress)**	**Action – (Reinstein pages)**
1795 *France*	Washington (n/a)	President's recognition based on law of nations. (pp. 9-14)
1800 *Santo Domingo*	Adams (6th Cong., 1st Sess.)	Congressional recognition of sovereignty. (pp. 14-15)
1806 *St. Domingue*	Jefferson (9th Cong., 1st Sess.)	Congressional recognition of sovereignty. (pp. 15-18)
1818 *Latin American Republics*	Monroe (15th Cong., 1st Sess.)	Presidential "cooperation" with Congress. (pp. 19-26)
1837 *Texas*	Jackson (24th Cong., 2nd Sess.)	Presidential deferral to Congress' recognition (pp. 26-30)
1849 *Hungary*	Taylor (31st Cong., 1st Sess.)	Presidential "recommendation" that Congress recognize.
1862 *Haiti & Liberia*	Lincoln (37th Cong., 2nd Sess.)	Congressional expression of recognition by statute. (pp. 30-32)
1864 *Mexico*	Lincoln (38th Cong., 2nd Sess.)	Congressional expression of its "authoritative voice." (pp. 32-35)
1898 *Cuba*	McKinley (55th Cong., 2nd Sess.)	Congressional recog-nition of peoples' inde-pendence. (pp. 35-41)

III.

DICTA IN THIS COURT'S OPINIONS DID NOT CONCERN DISAGREEMENT BETWEEN CONGRESS AND THE PRESIDENT

The court of appeals referred several times to its status as an "inferior" court and to its obligation to comply with *dicta* in this Court's opinions.[13] Language in decisions like *National City Bank v. Republic of China*, 348 U.S. 356, 358 (1955), and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964), describe the recognition power as belonging to "the Executive." These cases do not, however, address whether the recognition power is exclusive with the President or is shared with the Congress. They relate to whether the Judiciary plays any role in the recognition process.

To be sure, when there is no controversy, the President unilaterally makes a recognition decision and appoints an ambassador who is subject to Senatorial consent. The issue in this case concerns the less frequent instance – acknowledged never to have been confronted and decided by this Court –in which Congress disagrees with the President. The issue then is not whether the President has any recognition power; it is whether he has "exclusive" authority. The history we have recited demonstrates that neither Presidents nor Congresses have, when

[13] Early during the oral argument by petitioner's counsel in the lower court, Judge Tatel noted that the court of appeals was a "lower federal court" and was "bound by Supreme Court dicta." Transcript of Oral Argument, No. 07-5347, March 19, 2013, pp. 7-8.

recognition is controversial, viewed the recognition power as committed ***exclusively*** to the discretion of the Executive Branch.

This Court's opinion in *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 420 (1839), declared only that the President's determination regarding jurisdiction over the Falkland Islands was "conclusive on the judicial department." It did not address the question presented by this case – *i.e.*, the authority of Congress to legislate in this area.

The decisions of this Court that followed United States' recognition of the Soviet Union did not concern the constitutionality of a Congressional attempt to constrain the President's exercise of a recognition power. Hence language in this Court's opinions that spoke of recognition as an "executive function" (*United States v. Pink*, 315 U.S. 203, 230 (1942)) did not address cases where there is a dispute between the President and Congress. *See* Note, 127 Harv. L. Rev. 2154, 2160 (2014) (D.C. Circuit opinion in this case criticized for using "evidence of inherent power to support a claim of exclusive power").

Dicta in opinions of this Court are not one-sided. Many assign recognition authority to both Congress and the President. *See Boumedienne v. Bush*, 553 U.S. 723, 753 (2008) ("[T]he Court has held that questions of sovereignty are for *the political branches* to decide" (emphasis added)); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948) ("[T]he determination of sovereignty over an area is for *the legislative and executive departments*")

(emphasis added)); *Jones v. United States*, 137 U.S. 202, 214 (1890) ("All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts *of the legislature and executive*. . . . ") (emphasis added)); *Cherokee Nation v. Georgia*, 30 U.S. 1, 46-47 (1831) ("[T]he existence of foreign states cannot be known to this court judicially except by some act or recognition of *the other departments of this government*.") (emphasis added)).

Justice Sutherland's celebrated and much-criticized *dictum* in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936), is frequently cited to support the proposition that the President has "the very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations." In the *Curtiss-Wright* case, however, the President was acting under a broad delegation of authority conferred by Congress. Indeed, Justice Sutherland noted, "Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." 299 U.S. at 223.

This Court cited the *Curtiss-Wright* opinion as granting broad Presidential authority when the

President acts in the foreign-policy arena pursuant to a Congressional mandate. *Republic of Iraq v. Beaty*, 556 U.S. 848, 856-857 (2009). In these circumstances, Congress "think[s] it prudent to afford the President some flexibility." *Id.* That principle does not apply, however, when the President acts without Congressional authorization or, as in this case, contrary to Congress' policy as expressed in a duly enacted law.

Petitioner's counsel acknowledged during oral argument of this case in November 2011 in response to Justice Kennedy's question, that only the President may communicate the Nation's foreign policy to foreign countries. *Transcript*, pp. 5-6. In this same vein, Justice Scalia observed during the Solicitor General's oral argument that "nobody except the President of the United States pronounces the foreign policy." He added, however, that "to be the sole instrument and to determine the foreign policy are two quite different things." *Transcript*, p. 38.

Justice Kennedy asked during the November 2011 oral argument whether any treatise writer or decision of this Court supports a severe limitation on the President's foreign-affairs power when Congress disagrees with the President. *Transcript*, p. 6. In his authoritative study of constitutional law governing foreign affairs authority, Professor Louis Henkin declared that "in the competition for power in foreign relations," Congress has an "impressive array of powers expressly enumerated in the Constitution." Louis Henkin, *Foreign Affairs and the United States Constitution* (2d ed. Oxford Univ. Press, 2d ed. 1996)

63-82. Professor Henkin quoted in this regard the 1864 House Resolution passed during the incident involving France and Mexico. *See* p. 54, *supra.*

Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952), has been adopted by this Court as "the accepted framework for evaluating executive action in this [foreign-policy] area." *Medellin v. Texas*, 552 U.S. 491, 524 (2008). That concurring opinion sets out a "familiar tripartite scheme." *Id.* This case falls within Justice Jackson's third category – "[w]hen the President takes measures incompatible with the expressed or implied will of Congress." 343 U.S. at 637. Hence "his power is at its lowest ebb," and the President's "claim to a power at once so conclusive and preclusive must be scrutinized with caution." 343 U.S. at 638. The State Department's bar against designation of "Israel" on the passport or birth certificate of a Jerusalem-born American citizen cannot withstand such scrutiny.

During oral argument of this case in November 2011, the Chief Justice questioned whether *Medellin* applied here because in *Medellin* the President's action changed "domestic State law." *Transcript*, p. 11. The *Medellin* majority opinion, however, took "domestic State law" into account. It invoked Justice Jackson's "tripartite scheme" and denied authority the President had exercised when Congress had refused to authorize it after concluding that the President had "plainly compelling" justification for overriding State law. 552 U.S. at 524.

Consequently, even if the State Department's view regarding "Israel" as a place-of-birth for Jerusalem natives were "compelling" (which it is not, *see* pp. 64-65, *infra*), Congress' directive in Section 214(d) would override the State Department's view under Justice Jackson's "tripartite test."

IV.

ENFORCEMENT OF SECTION 214(d) WILL HAVE NEGLIGIBLE IMPACT ON AMERICAN FOREIGN POLICY

The State Department's justification for rejecting "Israel" as a permissible place of birth for citizens born in Jerusalem rests on a concern over mistaken *perception* by Palestinians. The Department fears, according to its response to Interrogatories, that Palestinians would conclude that American policy regarding Jerusalem has been "dramatically reversed." JA 53.

In fact, the FAM grants Palestinian-American passport-holders great leeway in selecting a place of birth for their passports. Consular officers and Department of State officials have been instructed, in virtually every instance other than the case of Jerusalem-born citizens, to apply the place-of-birth requirement flexibly in order to accommodate the personal ideologies and prejudices of passport-holders. *See* pp. 9-11, *supra.*

There are currently approximately 100,000 American citizens whose passports state that they were born in "Israel" because they were born in cities

like Tel Aviv, Haifa, or Beersheba – all of which have been recognized since 1948 as being within Israel. The practical effect of implementing Section 214(d) is to add a potential 50,000 Americans born in Jerusalem to those whose passports say "Israel."

Contrary to the concern expressed by the court of appeals that courts are "not equipped to second-guess the Executive regarding the foreign policy consequences of section 214(d)" (725 F.3d at 219) and the Chief Justice's inquiry during oral argument whether a decision in petitioner's favor would mean that this Court "know[s] foreign policy better" than the President (*Transcript*, p.13), this is not a case in which the separation-of-powers dispute is between the ***courts*** and the President. It is Congress that disagreed with the President's foreign-policy judgment. Congress' mandate in these circumstances does not depend on a sophisticated foreign-policy analysis. The State Department's stated justification for its practice must be subjected to the "scrutiny" prescribed by Justice Jackson's *Steel Seizure* opinion for Presidential measures in "category three." *See* p. 62, *supra*. Such "scrutiny" demonstrates the weakness of the Executive branch practice and its invalidity in the face of Congress' contrary finding.

Moreover, the history of the place-of-birth entry on a passport and the explanation given by the government in deposition and in its response to discovery demonstrate conclusively that the place-of-birth entry on a passport is designed not for any

foreign-policy purpose but only to identify the passport-holder. *See* pp. 8-9, *supra.* [14]

The government has exaggerated the impact of Section 214(d) and cannot resist repeating – the refrain – in every brief it has filed in this case that the case concerns the "status of Jerusalem" – "one of the most sensitive and long-standing disputes in the Arab-Israeli conflict." Brief for the Respondent in Opposition, No. 13-628, p. 2; *see also* Brief for the Respondent, No. 10-699, p. 2; *see also* Brief for the Respondent in Opposition, No. 10-699, p. 2; *see also* Brief for the Appellee, D.C. Cir. No. 07-5347, p. 2. When this litigation made its first appearance in this Court, the Court rejected that overblown assertion. It held that "[t]he federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored

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[14] The government acknowledged in discovery that because of "clerical errors" some United States passports and CRBAs specifying "Israel" have been issued to citizens born in Jerusalem. JA 64-66. No "severe adverse consequences" have resulted from the "erroneous" governmental issuance of these documents.

Nor is the prohibition applied to passports and CRBAs by the State Department universal throughout the Executive Branch. The *amicus curiae* brief of the Zionist Organization of America filed when this case was before the Court in its 2011 Term reported that in many Executive Branch departments the designation "Jerusalem, Israel" appears. Identification of Jerusalem within Israel by Departments such as the Departments of Justice, State, and Defense has not led to protests and condemnations by Palestinians.

determination of what United States policy toward Jerusalem should be." 132 S. Ct. at 1427.

The time has finally come for a hard-headed unemotional appraisal of the true legal issue in this case – petitioner's request "that the courts enforce a specific statutory right." *Id.* Now – more than a decade after his parents brought this lawsuit for him – petitioner respectfully asks this Court to grant him his "specific statutory right."

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed with instructions to enter summary judgment for the plaintiff and order the Secretary of State immediately to enforce and implement Section 214(d).

Respectfully submitted,

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