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 DC Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a nonprofit organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has long taken the view that the interests of all citizens are best served when the branches of government play their assigned roles within our constitutional system, with the latitude necessary for effective governance but without overstepping their powers. Thus, Public Citizen's attorneys have been active in cases involving separation-of-powers issues, representing both parties and amici curiae.

Unlike lawyers from the Department of Justice, who must support the President in such cases, or lawyers in the Office of the Senate Legal Counsel or the Counsel to the Clerk of the House of Representatives, who side with Congress, Public Citizen's lawyers have argued for and against assertions of power by all three branches. For example, Public Citizen lawyers represented parties in cases challenging the authority of Congress to exercise a legislative veto in *INS v. Chadha,* 462 U.S. 919 (1983); to authorize its agent, the Comptroller General, to perform certain functions in the implementation of the federal budget in *Bowsher v. Synar,* 478 U.S. 714 (1986); and to retain a role, through its delegated officials, in implementing the law creating the airports authority for the Washington, DC area, *Washington Metropolitan Airports*

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

Authority v. Citizens Against Aircraft Noise, 501 U.S. 252 (1991). And in *Mistretta v. United States,* 488 U.S. 361 (1989), Public Citizen attorneys represented the defendant, who argued that the issuance of binding sentencing guidelines by the congressionally created Sentencing Commission, which included Article III judges, violated the principle of separation of powers.

On the other side, Public Citizen filed an amicus brief supporting the power of Congress to enact statutes protecting the independence of some officers performing executive functions in the face of presidential claims, similar to those here, that such laws violate his implied powers. *See Morrison v. Olson*, 487 U.S. 654 (1988) (independent counsel statute). Likewise, Public Citizen's lawyers represented six members of Congress who challenged the Line Item Veto Act—which both Congress and the President supported—on the ground that it aggrandized the President's power at the expense of Congress's in *Raines v. Byrd,* 521 U.S. 811 (1997) (dismissed for lack of standing), and then filed an amicus brief arguing against the law's constitutionality on the merits in *Clinton v. New York City,* 521 U.S. 417 (1998). *See also Public Citizen v. Dep't of Justice,* 491 U.S. 440 (1989) (arguing for petitioner that requiring compliance by the ABA's Standing Committee on the Federal Judiciary with Federal Advisory Committee Act did not violate separation of powers); *Train v. Campaign Clean Water Inc.,* 420 U.S. 136 (1975) (arguing for respondent that President did not have authority to refuse to spend funds appropriated by Congress).

As these and other separation-of-powers cases in which Public Citizen has participated show, Public

Citizen does not reflexively favor the asserted interests of any particular branch. Public Citizen also has no interest in the specific policies reflected in the statute at issue here, nor in the policies said to be served by the State Department's contrary practice. Specifically, Public Citizen takes no position either on whether it is better policy to allow citizens born in Jerusalem to designate Israel as the place of birth on their passports or to require that their passports designate Jerusalem, or on the broader issue of the status of Jerusalem. Rather, as in other separation-of-powers matters, Public Citizen appears here to advocate the position that represents the best reading of the Constitution.

SUMMARY OF ARGUMENT

This case presents a direct clash between a statute that was properly enacted by Congress in a field in which it indisputably has legislative power, and a direction by the President of the United States to his Secretary of State to disobey that statute because the President believes that it unconstitutionally interferes with his ability to conduct the foreign affairs of the United States as he sees fit. Below, the court of appeals authorized the Secretary to disregard Congress's statutory directive on the basis that implied powers of the President with respect to foreign affairs allow him to do so if he disagrees with Congress's judgment.

Contrary to the view of the court of appeals, the conduct of matters touching on foreign affairs is a shared responsibility of the President and Congress. As a general rule, when Congress acts in an area of shared authority by passing a bill that the President signs into law or that is repassed over his veto, the

President must obey that law. To be sure, there might be cases in which congressional action could invade the province of the President in the actual conduct of foreign affairs by, for example, directly assuming the role of negotiating a treaty or by strictly confining the President's options so that, in effect, he would be unable to negotiate at all. But this case is a far cry from such a situation.

The portion of the statute at issue here, section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. Law No. 107-228, 116 Stat. 1350, directs that the executive branch honor the request of a U.S. citizen born in Jerusalem that his passport state his place of birth as "Israel," instead of the President's preference, "Jerusalem." Nothing in the statute requires the President to agree that Jerusalem is part of Israel or to abandon the executive branch's policy of neutrality over which sovereign controls Jerusalem, let alone to change any position that he wishes to maintain in trying to facilitate peace in the region. Indeed, the President may make clear in public statements and in applicable State Department manuals that Congress has created the right of someone born in Jerusalem to elect to have Israel listed as his place of birth and that the President's position is that the status of Jerusalem remains an open question, to be resolved in negotiations between Israel and its Arab neighbors.

The court of appeals erred in concluding that Congress had "prevent[ed] the Executive Branch from accomplishing its constitutionally assigned functions"—the applicable constitutional standard for finding a violation of separation of powers under *Nixon v. Administrator of General Services,* 433 U.S.

425, 443 (1977). The error was due in part to the court's over-reliance on dicta in *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936), to find a presidential primacy in matters touching on foreign affairs that is nowhere set forth in the Constitution. The court further failed to recognize that the Constitution grants Congress express powers in the fields of international commerce and naturalization, as well as the exclusive power to appropriate funds, all of which buttress the constitutionality of the statute at issue here.

Finally, the lower court's reliance on a prior history of congressional inaction in response to what the court concluded were similar exercises of presidential power was misplaced for several reasons. Even if those prior instances had involved a direct clash with a statute, which they did not, the conclusion that inaction equals approval is unsupported. Congress may refrain from enacting legislation to override the President's exercises of executive power for many reasons other than agreement that the President's power is exclusive. These include agreement with the substance of what the President did, the inability of Congress to agree on an alternative, the press of other more important business, and, in some instances, the recognition by Congress that the President would disregard any action it took.

Attributing constitutional significance to congressional inaction is also inconsistent with this Court's decision in *INS v. Chadha*, 462 U.S. 919. If, as the Court held in *Chadha*, action by a vote of one House of Congress has no constitutional significance, then

inaction by both Houses cannot possibly have any greater effect.

ARGUMENT

Congress Has Not Infringed on Exclusive Presidential Powers or Prevented the President from Carrying Out His Assigned Constitutional Functions.

A. Properly identifying the basis for Congress's and the President's actions is crucial to deciding the constitutional question presented.

In striking the balance required in separation-of-powers cases, it is important at the outset to identify the constitutional basis on which the President and Congress are staking their claims. The power at issue in this case, however denominated, is surely a federal power, and the question is where within the federal government the power is located. Indeed, the primary significance of *Curtiss-Wright*, on which the Secretary and the lower court place so much reliance, is that it confirms that powers over foreign relations intrinsically belong to the national government and not the states, even if those powers are not specifically enumerated in the Constitution. *See* 299 U.S. at 315–18; *see also* U.S. Const. art I, § 10 (listing a series of prohibitions and limitations against states engaging in activities involving foreign nations, which, in general, mirror the grants of power to Congress in the field of foreign affairs). That the powers are federal, however, only poses, but does not resolve, the question where, within the federal government, foreign relations powers not specifically addressed in the Constitution reside.

On the presidential side, the Constitution does not expressly assign to the President the power to conduct foreign affairs generally. Indeed, neither the term "foreign affairs" nor any similar phrase appears in Article II, which sets forth the powers of the President. Nor does Article II expressly mention passports or the power, relied on by the President here, to recognize governments of foreign states.

Some presidential powers clearly relate to foreign affairs, such as the power, with the advice and consent of two-thirds of the Senate, "to make Treaties," U.S. Const. art. II, § 2, cl. 2, and with the consent of the Senate to appoint "Ambassadors, other public Ministers and Consuls." *Id.* Article II, section 3 gives to the President the responsibility to "receive Ambassadors and other public Ministers," and importantly for this case it imposes on him the duty to "take Care that the Laws be faithfully executed." And his role as "Commander in Chief" of the armed forces, *id.* § 2, cl. 1, supports his claim to a role in foreign affairs, although that power is not relied on in this case. Everyone agrees that, at least in the absence of a statute directly bearing on a foreign affairs function, the President and other executive branch officers would have the power to do many things involving relations between U.S. citizens and foreign countries, including deciding how to describe the place of birth of an American citizen on a passport.

On the congressional side, the Constitution likewise does not expressly grant Congress power in the area of foreign affairs generally or passports in particular. Several provisions, however, provide Congress with powers concerning foreign affairs. Article I, section 8, clause 1 states the power "To lay and collect

Taxes, Duties, Imposts and Excises," which plainly involves foreign nations, as does the grant in the third clause of the power "To regulate Commerce with foreign Nations." The fourth clause permits Congress to "establish an uniform Rule of Naturalization," and the tenth clause authorizes Congress "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." The next six clauses all relate to the role of Congress in the raising, funding, and regulating of military forces and the militia, including the power to declare war. In addition, the all-important power of the purse is given to Congress in Article I, section 9, clause 7, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." And completing the scope of congressional power is the grant in Article I, section 8, clause 18 of the authority "To make all Laws which shall be Necessary and Proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof."

In light of these powers expressly granted to the President and Congress, and of the necessarily federal nature of powers over foreign relations, there can be little doubt that, at least in the absence of action by the other branch, either branch would have the power to institute some form of passport system. Thus, for example, if there were no laws authorizing the issuance of passports or requiring citizens to carry them to leave or reenter the country, the President would not exceed his powers if he created a passport system to aid United States citizens abroad and facilitate their reentry into the country after foreign travel, although the system would depend on

Congress then appropriating sufficient money to pay for any additional expenses that the system would entail. Indeed, that was exactly the situation in the early years of the Republic, before the first passport law was enacted in 1856. *See Kent v. Dulles*, 357 U.S. 116, 120–25 (1958).

If the President created such a system, it would necessarily include a determination of the kinds of information that the citizen must supply and what the government would include on the passport. Under that scenario, the President surely would not exceed his authority if he decided, as he has here, that passports of persons born in Jerusalem would identify their place of birth only as Jerusalem, with no country specified. Indeed, absent a statutory requirement, it would be well within the President's powers not to include place of birth at all on U.S. passports or to include the city (as well as or in place of) country of birth in all cases.

Similarly, Congress plainly has the authority to set up a passport system to assist U.S. citizens travelling abroad and/or to control entry into this country, and, indeed, may make passports mandatory for foreign travel, as it has done. It may also assign the State Department or any other agency, including one created for this purpose alone, the task of handling all passport matters. Congress could either define the duties of the responsible agency with considerable particularity, including specifying what a passport may or must contain, or Congress could assign that responsibility to the agency based on quite general directions.

The problem in this case is that Congress has been very specific on one aspect of passport contents, and

the President has taken a different view of what that content should be. But because Congress has acted through a duly enacted law, its decision controls, unless it violates the Constitution in some respect.

Although the statutory provision at issue here concerns only the contents of passports, the function on which the lower court and the Secretary of State mainly rely for their assertions that presidential authority is supreme is the recognition of foreign governments. If the question is whether a new regime in a country is the legitimate successor to its predecessor, and an answer is needed immediately, the President may and perhaps must make that decision. And even when exigent circumstances are not present, such decisions fall to the President in the absence of congressional legislation on the subject, which is how Congress has been willing to resolve these matters over the course of our nation's history.

Section 214(d), however, presents no issue of recognition of any country, or even of resolving a dispute concerning sovereignty over a particular territory. No party contends that section 214(d) attempts to force the President to recognize, formally or even informally, the legitimacy of the claim of Israel (or any other country) to be the rightful owner of Jerusalem (although other parts of section 214 not at issue in this case push the President in that direction). And this passport provision is surely not, in the words of President Andrew Jackson, "a power the exercise of which is equivalent, under some circumstances, to a declaration of war." 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 267.

Moreover, to the extent that the power of recognition rests on the need for an immediate determination, or the superior ability of the President to gather the relevant facts to make such a decision, those considerations have no bearing on this case. The facts regarding the claimed rights of various nations to Jerusalem have been equally known to Congress and the President for decades. The debate between them is over whether the interests of the United States are better served by allowing people born in Jerusalem to choose to have Israel listed as their place of birth on their U.S. passports or by requiring that all such persons have their place of birth identified only as Jerusalem. That policy debate has virtually nothing to do with where, within our federal government, the power to recognize new foreign governments is reposed.

B. The applicable test for balancing the interests of Congress and the President requires the Court to give great weight to laws passed by Congress.

In *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952), this Court was faced with a similar separation of powers issue, although there Congress had not enacted a law with the same degree of specificity as it has in section 214(d). As this Court has observed, the "familiar tripartite scheme" from Justice Jackson's *Youngstown* concurrence provides the accepted framework for evaluating executive action in this area." *Medellín v. Texas,* 552 U.S. 491, 524 (2008). This case falls into Jackson's third category:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Youngstown, 343 U.S. at 637–38 (Jackson, J., comcurring) (footnote omitted)

Justice Jackson regarded *Youngstown* as a category three case because of his view that the President's seizure of steel mills implicitly conflicted with statutes authorizing such emergency actions in other circumstances. *Id*. at 639–40, 653. On the other hand, the Court's lead decision rested more on the absence of congressional authorization than on outright conflict with congressional enactments. *See id*. at 585–86 (majority opinion). Since *Youngstown*, however, the Court has considered two clear category three cases, both involving situations in which the President claimed, as he does here, that his implied powers trumped congressional enactments that allegedly infringed on those powers. In both cases, this Court upheld the statutes against such claims, and its analyses provide direct and useful guidance here.

In *Nixon v. Administrator of General Services,* 433 U.S. 425, the Court considered a statute that required former President Richard Nixon to turn over papers

and tapes from his administration to the General Services Administration, which would then review them and make them public with certain exceptions. Although the Constitution does not expressly empower the President to control access to his papers, the Court recognized a "presumptive confidentiality of Presidential communications." *Id.* at 440. The principal separation of powers issue, then, was whether the statute trumped the former President's right to decide who would have access to his presidential papers for the purpose of determining whether they would be publicly disclosed under the statute. To answer that question, the Court stated the test as follows:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States v. Nixon*, 418 U.S. [683,] 711–712 [(1974)]. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. *Ibid*.

433 U.S. at 443. The Court then rejected the claim that the limited intrusion contemplated by the statute would interfere with executive prerogative. *Id.* at 451. The specifics of the interests at stake in that case are not relevant here, but the test—"the extent to which [the statute] prevents the Executive Branch from accomplishing its constitutionally assigned functions," *id*. at 433—and the outcome—holding the President's

interests subservient to the statutory mandate—are instructive.

Morrison v. Olson, 487 U.S. 654, similarly involved a clash between an implied presidential power and a duly enacted statute. The separation of powers issue was whether the Independent Counsel Act deprived the executive branch of "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.* at 696. The Court first quoted the test from *Nixon v. Administrator,* 433 U.S. at 443, and then answered the question by upholding the law. Again, the Court's balancing process is relevant here, although not the interests on either side of the specific case.[2]

C. *Curtiss-Wright* has no bearing on this case.

Before applying the *Nixon v. Administrator* test to this case, it is essential to explain why, contrary to the views of the Secretary and the position of the lower court, the decision in *Curtiss-Wright*, 299 U.S. 304, has no bearing on the outcome of this case. Unlike here, the issue in *Curtiss-Wright* was not whether presidential power overrode an act of Congress, but whether a statute *conferring authority* on the President was unconstitutional. Congress had passed a joint resolution (another name for a statute enacted into law by Congress and signed by the President)

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[2] Both *Nixon* and *Morrison* also involved claims that the laws at issue violated specific provisions of the Constitution designed to protect the interests of the party challenging the law. Those issues were not resolved using the separation-of-powers test set forth in the text. In this case, the President makes no similar text-based claim, and the applicable test is therefore the one enunciated in *Nixon*.

making it a criminal offense to sell arms to either party to an armed conflict between Bolivia and Paraguay if the President determined that prohibiting such sales would contribute to peace between the two countries. The President had made such a finding, and both the sufficiency of the President's determination and the constitutionality of the statute were challenged by a defendant indicted for conspiring to sell machine guns to Bolivia. *See id.* at 311–14. The presidential determination did not oppose the joint resolution but implemented it, and the Court held that Congress had the power to delegate such authority to the President in light of the President's significant role in developing and implementing foreign policy. *Id.* at 321–22.

Thus, *Curtiss-Wright* was, in Justice Jackson's *Youngstown* terminology, a category one case: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). The footnote immediately following that sentence in Justice Jackson's opinion leaves no doubt about what category *Curtiss-Wright* occupied in his thinking:

> It is in this class of cases that we find the broadest recent statements of presidential power, including those relied on here. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, involved, not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress. … It was inti-

> mated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.

Id. at 635 n.2. Because the instant case, in contrast, is a category three case, *see supra* pages 11–12, *Curtiss-Wright* has little bearing on its outcome.

Moreover, as Justice Jackson observed, "[m]uch of the Court's opinion [in *Curtiss-Wright*] is dictum." 343 U.S. at 635 n.2. The opinion's broad dicta treat the role of the President in foreign affairs as if it were expressly granted in the Constitution, and overlook the many ways in which Congress has been assigned authority in areas relating to foreign affairs. Indeed, the opinion fails to note the obvious points that, absent congressional legislation, the President certainly would have lacked the power to criminalize the arms sales at issue, and that the legislation that was essential to that result necessarily involved an exercise of *congressional* power with respect to a matter that touched on foreign affairs.

In addition, the circumstances described in *Curtiss-Wright* as those in which the President *should* have the primary role are oceans apart from the issue of what birthplace should be listed on an American citizen's passport. Justice Sutherland described those circumstances as follows:

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

> . . .
>
> Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

299 U.S. at 319–20.

Justice Sutherland's invocation of the treaty negotiation power to support the sweeping proposition that only the President can speak for the nation in matters touching foreign affairs surely goes too far. In any event, section 214(d) has nothing to do with speaking as a representative of the United States, negotiating a treaty, or acting in time of war. Moreover, Congress had equal access to the relevant information here (unless the President has withheld it during Congress's deliberations), and a law enacted to control the contents of passports poses no issue of premature disclosure of information. In short, even if the considerations set forth in *Curtiss-Wright* were not dicta, they would have no bearing on the narrow issue presented by section 214(d).[3]

Moreover, other decisions of this Court demonstrate that the President does not have unfettered power to act contrary to statute in matters

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[3] The amicus brief of historian Louis Fisher in support of petitioner contains an in-depth analysis of the errors in the *Curtiss-Wright* dicta.

involving foreign relations. For example, an early decision, *Little v. Barreme,* 6 U.S. (2 Cranch) 170 (1804), held that a statute enacted by Congress trumped a contrary presidential order. The law at issue in *Little* made it illegal for American vessels (broadly defined) to send cargo *to* France or its colonies. The President sent instructions to the Navy to seize vessels if they were coming to or *from* France and its colonies. *Little* involved the seizure of a vessel coming *from* a French island. The Court held that, despite the President's orders, the seizure was unlawful, and the Navy captain who had seized the vessel had to pay damages.

Little demonstrates the Court's recognition of the primacy of statutes as against a presidential order, more than a century before *Nixon v. Administrator*. Moreover, because in *Little* the President was acting pursuant to his express Commander-in-Chief powers involving a plainly military matter, his authority should have been at its apex. Nonetheless, the military officer who had followed his orders, and might have been disciplined had he questioned them, was held personally responsible for not adhering to the limits in the statute. The harshness of the result for the Navy captain underscores how strong the interest of the President must be to overturn an otherwise lawful statute.

Similarly, *Medellín v. Texas,* 552 U.S. 491, rejected the President's claim that his treaty-making power impliedly granted him the power to implement a treaty that was not self-executing. The President's position in *Medellín* was stronger than it is here because Congress had not enacted a law that took a diametrically opposite position from the President's.

This Court nonetheless treated the President's act as a nullity:

> When the President asserts the power to "enforce" a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate. His assertion of authority, insofar as it is based on the pertinent non-self-executing treaties, is therefore within Justice Jackson's third category, not the first or even the second.

Id. at 527. While *Medellín* is distinguishable in many respects, it further confirms that, even in a foreign affairs situation governed by a treaty, the President's implied powers are limited when Congress has exercised its own Article I powers.

D. The President's recognition powers are not at issue in this case.

The court of appeals and the Secretary attempt to justify the claim of unconstitutionality by asserting that providing a U.S. citizen the choice of designating either Israel or Jerusalem as his place of birth undermines what the Secretary asserts is the President's exclusive constitutional authority to recognize foreign governments. Petitioner's brief discusses the history and meaning of the recognition power at length; this brief will make only two points.

First, the text of the Constitution does not commit the recognition power to either the President or Congress. Therefore, the most logical conclusion is that the power is shared. An example illustrates the sense of this conclusion: Suppose in a foreign country a new government takes over from the prior one after a coup. The President wishes to recognize the new government, send an ambassador, and establish an

embassy there. Before doing so, however, he needs the Senate to confirm his ambassador and Congress to appropriate funds to operate the embassy. Thus, as a practical as well as legal matter, powers implicating recognition cannot reside in the President alone.

Second, the Court in this case need not answer the question where the recognition power finally lies. Section 214(d) has no impact at all on the issue of recognizing which country has the right to govern Jerusalem. The President's asserted recognition power and his ability to negotiate treaties designed to achieve peace in the Middle East are unaffected by section 214(d).

E. Section 214(d) does not prevent the executive branch from accomplishing its constitutionally assigned functions.

As to the question presented in the case, the applicable standard is the one set forth in *Nixon v. Administrator*: "the extent to which [section 214(d)] prevents the Executive Branch from accomplishing its constitutionally assigned functions." 433 U.S. at 443. As discussed above, no one in the executive branch has "constitutionally assigned functions" regarding the contents of passports, passports generally, or even the conduct of foreign affairs. The President's role in those functions is implied, just as is that of Congress. Even assuming that conducting foreign affairs is an executive function, neither the Secretary nor anyone else has demonstrated any concrete harm that will befall the United States if the place of birth on petitioner's passport (and that of any other Jerusalem-born American who so requests) says Israel.

According to the Secretary's response to petitioner's discovery request, the reason for including the place of birth on a passport is solely to assist the Department in distinguishing among the millions of U.S. passport holders, which include 10 million new or renewed holders each year. *See* JA 42, 69–70. The Secretary has not claimed that this limited function will be impaired by replacing Jerusalem with Israel for those who prefer that designation.

Moreover, although the President's signing statement expressed opposition to the *entirety* of section 214 (of which the passport provision is one of four parts) as an "interference" with presidential authority,[4] no President or Secretary of State has offered any support for the claim that substantial harm will result if the place-of-birth provision is implemented. The only justification offered for refusing to abide by the statute is contained in the answer to Interrogatory 5 posed to the Secretary and answered by the Director of the Office of Israel and Palestine Affairs. *See* JA 52–59. The answer mainly recites the history of the Department's position on designating Jerusalem as the place of birth and contains no specifics, other than that Palestinian groups complained when the law was passed.

Nixon v. Administrator, however, requires *some* showing of harm to an interest of the executive branch to overcome the force of a statute. Although the Secretary has complete access to whatever evidence might be available to support his claim of

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[4] *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, 2002 Pub. Papers of the Presidents of the United States: George W. Bush (Sept. 30, 2002).

injury to the foreign relations of the United States, such a showing has not been made here.

Other parts of section 214, not at issue in this case, do reflect differences in the policy approaches of the President and Congress as to both the status of Jerusalem and the impact that a U.S. policy symbolically acknowledging Israel's claims to Jerusalem would have on negotiations for peace between Israel and its neighbors. The Secretary takes the position that Congress has no policy role in foreign affairs. That position could be sustained, however, only if the Court accepted the claim that the executive branch has exclusive authority to act in all matters of foreign policy. Yet the cases cited by the court of appeals for such supremacy do not deal with the President's powers versus those of Congress, but only with his powers versus those of the states, *Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 415 (2003), or the judicial branch, *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 410 (1964). When it comes to making federal policy, however, Congress is the elected representative of the people. As in *Youngstown,* where this Court affirmed Congress's primary policymaking role as against that of the President, the President's exercise of claimed implied powers does not override policy choices reflected in legislation passed by Congress and enacted into law. Nonetheless, here, this Court need not resolve this question because the only provision at issue does not directly implicate control over the foreign policy of the United States with respect to the status of Jerusalem.

As to the indirect impact of section 214(d) on U.S. foreign relations, the means chosen by Congress to allow a citizen to express his or her passport

preference produce very limited, if any, adverse effects, even viewed from the perspective of the executive branch. Thus, Congress did not direct the Secretary to include Israel on the passport of all American citizens born in Jerusalem, which might look to some as official government policy or even recognition of the status of Jerusalem. Instead, Congress gave the citizen a choice. By providing such a choice, section 214(d) is neutral on the question of Jerusalem's status, and merely accommodates the differing views of U.S. citizens insofar as they relate to the designation of their own places of birth. Furthermore, nothing prevents the Secretary from amending the Department's Passport Manual, or making any other public statement, to explain that the designation of Israel as the place of birth on passports of citizens born in Jerusalem who elect that designation does not constitute the official position of the United States on Jerusalem, but instead reflects the personal choice of the citizen. Under all these circumstances, there is no basis to conclude that the operation of section 214(d) "prevents the Executive Branch from accomplishing" any function, let alone any of "its constitutionally assigned functions."

The limited impact of allowing this kind of choice can be seen from a similar law regarding passports for American citizens born in Taiwan. Enacted in 1994, that law permitted U.S. citizens born in Taiwan to have Taiwan listed as their place of birth on their passports, even though the United States did not recognize Taiwan as a country. As described more fully in petitioner's brief (at 12–13, 21–22) and in the contemporaneous documents the Secretary provided in discovery, JA 150–68, 178–92, the same kinds of objections raised here were raised by the Administra-

tion then with regard to the likely response of China, but adverse effects did not materialize. Moreover, the State Department responded to the Taiwan passport law by issuing its statements to make clear that the law did not reflect a change in U.S. policy toward either Taiwan or China. *See* JA 150–58. That same course of action is fully available here.

F. Congressional silence is not relevant in this case.

The Secretary argues that Congress, by going along with the President's prior acts in the supposedly related area of recognition of foreign governments, has effectively either (a) interpreted the Constitution in an authoritative manner that accords the President this power, or (b) by its silence ceded the power to the President. The court of appeals agreed with the Secretary that the long history of unilateral presidential action on recognition, in which Congress supposedly "acquiesced," supports the conclusion that the President has exclusive recognition power and that, therefore, section 214(d) unconstitutionally infringes on that power. For several reasons, the court of appeals erred in concluding that the history on which it relied is relevant here.

First, section 214(d) does not require any change in the recognition policy of the United States. In this case, the issue is passports, not recognition, and a statute stands in the way of the President's preference, which was not the case in any of the examples cited by the court of appeals.

Second, congressional "silence" is generally of dubious relevance as a logical matter for many reasons. Lack of response is relevant only if Congress (as a whole) has plainly heard the message and there

is a strong basis for assuming acquiescence. Even assuming that Congress as a whole understood that a presidential action (such as the recognition of a foreign government) was based on a claim of exclusive authority, the absence of a legislative response might reflect congressional agreement with the substance of the action as opposed to the claim of exclusive authority. Or Congress may have taken no further action because to propose, discuss, and pass a resolution objecting would have been an ill use of congressional time. Or Congress may have viewed the situation as an impasse as to which nothing further could be achieved by legislation in the face of presidential obduracy, and in which other solutions, such as lawsuits by individual Members of Congress, were likely to prove unavailing. *See Raines v. Byrd,* 521 U.S. 811.

Third, this Court in *INS v. Chadha,* 462 U.S. 919, held that Congress could act in a manner that affected persons outside Congress only by compliance with the Presentment Clause of Article I, section 7, which requires both Houses of Congress to agree and the President to concur, unless each House can muster a two-thirds vote to override a veto. The one-House veto in *Chadha* was unconstitutional because it did not satisfy the Presentment Clause. But if *action* by *one* House of Congress, which at least overcomes the sub-constitutional objections to the use of silence to imply consent, is of no effect, then surely *inaction* by *both* Houses cannot have effect.

This principle, which is spelled out in greater detail in Alan B. Morrison, *The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation,* 81 Geo. Wash. L. Rev. 1211

(2013), applies with special force in this case. In many cases cited in that article, the issue was one of statutory interpretation or in some cases what to do when statutes were unclear on whether Congress had delegated a power to the executive branch. In such cases, silence would be used at most to fill a gap that could plainly be closed by Congress. Here, by contrast, there is no gap and no silence: Congress has spoken clearly on the precise issue of what a passport may say as place of birth for a person born in Jerusalem.

As for the notions that history shows that Congress interprets the Constitution to give the President the power at issue here, or that Congress has somehow ceded the power to the President through acquiescence, these theories cannot hold because Congress never purported to do any such thing, silently or otherwise. Moreover, this Court, not Congress, has the final say on the meaning of the Constitution. *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803); *see also Chadha,* 462 U.S. at 960 (Powell, J., concurring in the judgment) (veto unconstitutional because House "assumed a judicial function in violation of the principle of separation of powers").

The idea that Congress has ceded constitutional power by silence is particularly offensive to the principles of *Chadha*. It assumes not only that Congress can act without passing legislation, but also that Congress has the right to give away its constitutional power, much the way that a landowner can lose title to his property through a claim of adverse possession. That approach must fail because the principles of separation of powers were not enshrined in our Constitution for the three branches

to rearrange as they may find convenient. Thus, in *Clinton v. City of New York,* 524 U.S. 417, Congress had passed a law allowing the President to exercise a line item veto over parts of a law with which he disagreed. Although the President and Congress both supported this realignment of the legislative function, this Court held that the statute violated the Presentment Clause, which requires the President to sign or veto the entirety of a bill presented to him for his signature. Because Congress cannot by statute alter the allocation of powers between it and the President under the Constitution, it surely cannot accomplish that same end by failing to respond when a President takes action that is not authorized by law and is beyond his express constitutional authority. *See* Morrison, 81 Geo. Wash. L. Rev. at 1230 (arguing that neither action nor inaction can shift constitutional power by "adverse possession").[5]

The Court's recent decision in *Noel Canning v. NLRB,* 134 S. Ct. 2550 (2014), does not alter this analysis. That case did not concern implied powers. The issues on which the majority and the concurrence differed related to the meaning of two phrases in the recess appointment clause in Article II, section 2, clause 3: "may happen" and "the Recess of the Senate." The first question addressed by the Court

[5] The *Chadha* objection does not apply in situations in which there is no claim of acquiescence that results in a transfer of power. Rather, the claim in such cases is that a long history of a practice suggests that the action being challenged has been accepted as consistent with separation of powers. *See Mistretta v. United States,* 488 U.S. at 401 ("Our 200-year tradition of extra-judicial service is additional evidence that the doctrine of separated powers does not prohibit judicial participation in certain extrajudicial activity.").

was whether the phrase "the Recess of the Senate" is limited to the recess that occurs between the first and second sessions of every Congress or also applies to other periods when the Senate is not in session. The second question was whether the recess power is limited to vacancies that first arise when the Senate is in recess, or whether it also applies to vacancies that arise before the Senate goes into recess.

The majority rejected both limitations. In doing so, it relied on the history of Senate and presidential actions regarding recess appointments as a guide to understanding the meaning of those phrases, while also considering the purpose and practical realities of governing that underlay the recess appointment power. The majority stressed that it did not rely on mere "silen[ce] or passiv[ity]" by the Senate, and it recognized the difficulties posed by relying on congressional inaction. *See* 134 S. Ct. at 2564. Even so, the concurring Justices found a different meaning in the history, which underscores the difficulty in placing heavy reliance on inferences drawn from events as to which there is no definitive agreement about what the parties understood had happened or about the significance of any reaction (or lack thereof) of one branch to action by the other.

Debatable as such inferences may be, the opinions in *Noel Canning* cite history to attempt to show a common understanding among the branches of the actual words used in the Constitution. In light of those words, particular appointments made by past Presidents either were or were not proper, and congressional actions reflecting acceptance of such presidential appointments could provide at least some evidence of a shared understanding that the actions

were not improper under the controlling constitutional text.

Unlike *Noel Canning*, this case does not involve an interpretation of constitutional text: No words in the Constitution assign foreign affairs, let alone passports, to one branch or the other. Thus, here, both the lower court and the Secretary seek to do more with the history that they cite: They offer it to establish that Congress has, in effect, agreed with the President that he has the sole right to fill a constitutional void. Such an inference is particularly unwarranted in an area of shared authority where, in the absence of conflicting congressional legislation, Congress would have no basis for objecting to unilateral presidential action. Past instances of congressional inaction regarding the President's recognition of foreign governments, where such recognition did not violate any statute, cannot support the legitimacy of presidential action here, in the face of Congress's enactment of a law that mandates action directly contrary to that preferred by the President.

Finally, if congressional acquiescence could result in a forfeiture of powers held by Congress, presidential acequiescence could likewise result in forfeiture of powers held by the President. And as noted above, when Congress passed a law directing the State Department to use Taiwan as the place of birth for Americans born there, the President objected but complied. But although presidential acquiescence presents no comparable Presentment Clause problem, his prior passivity is equally irrelevant in assessing separation of powers claims. Just as Congress might not object to presidential actions allegedly infringing its authority for any number of reasons, a President

might choose to go along with a law for any number of reasons, even when he believed that it infringed on his authority.

Moreover, even if a President affirmatively approved the law, persons injured by the law would not be precluded from raising their constitutional objections. Separation of powers is not just for the benefit of the incumbent, but also protects future Presidents and Congresses, as well as all Americans who depend on separation of powers to protect their rights and liberties. "So convinced were the Framers that liberty of the person inheres in structure [separation of powers] that at first they did not consider a Bill of Rights necessary." *Clinton,* 524 U.S. at 450 (Kennedy, J. concurring); *see Chadha,* 462 U.S. at 935–36 (upholding standing of a private party to enforce separation-of-powers claim of President against Congress).

As this Court observed in *Bond v. United States,* 131 S. Ct. 2355, 2365 (2011), "[i]n the precedents of this Court, the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances." Here, too, the claim of an individual is at issue. Just as the President's acceptance of congressional overreach does not bar the claim of an individual who suffers as a result, *see*, *e.g.*, *Chadha*, 462 U.S. at 941–42), Congress's failure to object to past presidential claims of exclusive authority cannot deprive petitioner of the protections that the Constitution affords him.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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