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 *AMICUS CURIAE* OF AMERICAN JEWISH COMMITTEE IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICUS*[1]

The American Jewish Committee ("AJC") is a national organization with more than 125,000 members and supporters and 22 regional offices nationwide. It was founded in 1906 to protect the civil and religious rights of American Jews. Its mission is to enhance the well-being of Israel and the Jewish people worldwide, and to advance human rights and democratic values in the United States and around the world. As part of that mission, AJC recognizes that the well-being and dignity of United States citizens born in Jerusalem is protected and enhanced as a result of Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228 § 214(d), 116 Stat. 1350 ("Section 214(d)").

Section 214(d) requires the Secretary of State to record in United States passports the place of birth of a United States citizen born in Jerusalem as "Israel" upon the request of the citizen. In doing so, the statute upholds the dignity of United States citizens born in Jerusalem who wish to identify Israel as their nation of birth. At the same time, Section 214(d) in no way obstructs or contradicts longstanding American policy, endorsed by AJC, in support of a peaceful, negotiated resolution to the status and geographic boundaries of Israel and its neighboring states. AJC thus has a particular interest in the outcome of this litigation, as it relates directly to AJC's core mission.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The Court of Appeals erroneously held the constitutional power to recognize a foreign sovereign—or, stated more accurately in this case, to recognize the territorial integrity of a recognized foreign sovereign, the nation of Israel—is reposed "exclusively" in the President under the Constitution. *Zivotofsky ex rel. Zivotofsky v. Secretary of State*, 725 F.3d 197, 220 (D.C. Cir. 2013), *cert. granted*, 134 S. Ct. 1873 (2014). In so holding, the Court of Appeals endorsed an inaccurate view of history, finding that "[b]eginning with the administration of our first President, George Washington, the Executive has believed that it has the exclusive power to recognize foreign nations." *Id.* at 207. This is not an accurate statement of the historical recognition power, nor of what the executive has historically "believed" the recognition power to be. The consequences of the Court of Appeals' decision are far-reaching, depriving Congress of any role or influence in any foreign policy decision touching upon the purported "exclusive" recognition power of the President.

A scrupulous and evenhanded examination of the historical record discloses no purpose or design to leave such unfettered discretion in the hands of the executive branch alone. Rather, the record shows: (1) at the time the Constitution was written and ratified, neither its drafters nor its ratifiers signaled any intention to accord to the President plenary authority to recognize foreign governments; (2) from the ratification of the Constitution to the present, although the President has customarily taken the lead on recognition, he has frequently acknowledged a concurrent and at times superior role for Congress; (3) Congress has historically exercised legislative

predominance over United States passports, and the President has faithfully executed congressional acts and respected statutory limits with respect to passports; and (4) the exercise of congressional authority in Section 214(d) to permit United States citizens born in Jerusalem to have their place of birth listed as "Israel" on their passports is consistent with historical practice.

History does not, in short, place the recognition power and all related decisions within an exclusively executive domain, fortified against the slightest tremor of legislative interference. Congress has a constitutional balancing role with respect to recognition decisions, as it does in other fields of domestic and foreign policy. It properly exercised its authority to direct the Secretary of State regarding the contents of passports, and did not infringe on any plenary field of executive authority. Section 214(d) is therefore constitutional.

ARGUMENT

I. NO EVIDENCE EXISTS THAT THE DRAFTERS OR RATIFIERS OF THE CONSTITUTION INTENDED TO VEST PLENARY RECOGNITION AUTHORITY IN THE PRESIDENT

The Court of Appeals found neither the text of the Constitution nor the originalist evidence of "much help" in determining the source or scope of the President's recognition power. *Zivotofsky*, 725 F.3d at 206. AJC agrees with this finding. The Constitution is silent on the power to recognize foreign governments, despite its enumeration and allocation of many other foreign affairs powers. *See* U.S. CONST. art. I, §§ 1, 8; U.S. CONST. art. II, §§ 1, 2, 3. A

"thorough review" of the drafting and ratification debates "reveals that no issue concerning the recognition power was even raised[.]" Robert J. Reinstein, Recognition: A Case Study on the Original Understanding of Executive Power, 45 U. RICH. L. REV. 801, 819-20 (2011).

A. The Constitutional Convention Never Considered Recognition.

The proceedings at the Constitutional Convention of 1787 disclose no intention to vest a plenary recognition power in the President. Leading proponents of a strong executive, including James Wilson and Alexander Hamilton, mentioned neither the recognition power nor the Receive Ambassadors Clause during their otherwise lengthy discourses on executive authority. *See* Reinstein, 45 U. RICH. L. REV. at 814, 844 (*quoting* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 65-66, 292 (rev. ed. 1966)). The Receive Ambassadors Clause also engendered no debate; the draft clause submitted by the Committee of Detail was revised to add "and other public Ministers," but otherwise received no attention. *Id.* at 843-44 (*citing* 2 RECORDS OF THE FEDERAL CONVENTION at 419). The clause is not included as a "'power' of the President" in Section 2 of Article II, but rather "is placed in Section 3 of Article II, which contains a list of executive duties." *Id.* at 813 (*quoting* Louis Henkin, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 37-38 (2d ed. 1996)). This treatment of the Receive Ambassadors Clause is more consistent with "a simple ministerial function" than "an important executive power," and presents "no evidence" that the delegates viewed the clause "as vesting the recognition power in the President." *Id.* at

845. There is "no record" that the subject of recognition "ever came up in the Convention." *Id.*

B. The Ratification Debates Did Not Address Recognition.

The ratification debates likewise reveal no plans to vest plenary recognition power in the President. There is "practically nothing of substance about the Receive Ambassadors Clause" in the ratification debates, and nothing regarding the recognition power. Reinstein, 45 U. RICH. L. REV. at 846-48. THE FEDERALIST PAPERS addressed the Receive Ambassadors Clause only briefly, with Alexander Hamilton arguing that it was "more a matter of dignity than of authority," because it would be "far more convenient" to have the President perform the function than to convene Congress "upon every arrival of a foreign minister[.]" Alexander Hamilton, Federalist No. 69, *in* THE FEDERALIST PAPERS 419 (2003); *see also* Federalist No. 77, *Id.* at 462. Federalist pamphlets similarly regarded the Receive Ambassadors Clause as a ministerial function. Reinstein, 45 U. RICH. L. REV. at 848 & n. 339 (*citing A Native of Virginia, Observations upon the Proposed Plan of Federal Government* (April 2, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 655-56 (2009); *Albany Federal Committee, An Impartial Address* (April 20, 1788), in 21 THE DOCUMENTARY HISTORY 1379-81)). The one reference to the clause in the state convention debates also treated it as ministerial. *Id.* at 847 (*quoting* Archibald Maclaine (July 28, 1788), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION OF PHILADELPHIA IN 1787 1, 135 (2d ed. 1836)).

II. THE PRESIDENT'S HISTORICAL EXERCISE OF THE RECOGNITION POWER ACKNOWLEDGES A CONCURRENT AND AT TIMES SUPERIOR ROLE FOR CONGRESS

Turning to the post-ratification evidence, the Court of Appeals found a "longstanding and consistent" post-ratification practice supporting the Secretary's position "that the President exclusively holds the recognition power." *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 207 (D.C. Cir. 2013) *cert. granted*, 134 S. Ct. 1873 (U.S. 2014). An impartial examination of the historical evidence, however, establishes no "universal and long-established tradition" of exclusive executive authority in this area. *Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002).

The question of recognition and whether it "is entrusted, under the constitution, to the discretion of the president acting alone, or whether it is vested in congress, or requires the joint action of the political departments of the government" has been "much discussed" since ratification. John Bouvier and Francis Rawle, 1 BOUVIER'S LAW DICTIONARY: A CONCISE ENCYCLOPEDIA OF THE LAW 1124 (3d rev. 1914) ("BOUV."). These discussions offer little if any evidence of a plenary executive recognition power.

Indeed, for most of the nation's early history, the President accepted input and cooperation from Congress, and often expressed deference to Congress on questions of recognition. While the President has often taken the lead on recognition decisions, and Congress has often acquiesced, both have consistently acknowledged that Congress has at least concurrent recognition powers, and on a number of occasions the

President has yielded to the superiority of congressional recognition authority.

A. Early Discussions of Recognition and the Acknowledgment of a Superior Recognition Power in Congress.

Following ratification, early administrations devoted considerable attention to the question of whether the power to recognize foreign governments resided with the President, Congress, or both. From these discussions, a prevailing view emerged that recognition was a concurrent power that should be exercised cooperatively. In the event of a conflict, however, the President generally conceded that Congress held the superior recognition authority.

1. Washington and the Neutrality Crisis.

The Court of Appeals began its analysis with Washington's unilateral recognition of the French post-revolutionary government during the Neutrality Crisis of 1793 as evidence that the executive has believed since Washington "that it has the exclusive power to recognized foreign nations." *Zivotofsky*, 725 F.3d at 207. The decision of the Washington administration to receive a minister from France's post-revolutionary government, however, did not place Washington in conflict with Congress, nor was it defended by him as an exercise of exclusive executive power.

The Neutrality Crisis arose when Congress was not in session. Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 380 (2012). Washington recognized the post-revolutionary French government based on his belief that the Take Care Clause, U.S. CONST., art. II, § 3, obligated him to do so under the

rule of *de facto* recognition and his duty to faithfully execute the law of nations. *See* Reinstein, 46 U. RICH. L. REV. at 375-81; Reinstein, 45 U. RICH. L. REV. at 839 (*citing* a statement approved by Washington from Thomas Jefferson to Gouverneur Morris (March 12, 1793), in Thomas Jefferson, 25 THE PAPERS OF THOMAS JEFFERSON 367 (1995)); David Gray Adler, *The President's Recognition Power*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 138-39 (1996)). Affirming that "every nation has a right to govern itself internally under what form it pleases, and to change these forms at it's [sic] own will," Washington concluded in the Proclamation of Neutrality that the "will of the nation" required recognition. 45 U. RICH. L. REV. at 839.

Contrary to the characterization by the Court of Appeals, the Cabinet divided over the Neutrality Crisis. *Compare Zivotofsky*, 725 F.3d at 208 (*citing* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 312 (2001)), *with* Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 TEMP. L. REV. 1, 9-10 (2013). *See also* Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1010 (2013). The issue of whether receiving the Ambassador would ally the United States with France instigated a public debate between Alexander Hamilton as "Pacificus" and John Madison as "Helvidius" over the extent of inherent executive power in foreign affairs. William R. Casto, *Pacificus & Helvidius Reconsidered*, 28 N. KY. L. REV. 612, 613 (2001). Hamilton defended the Proclamation of Neutrality as required under the law of nations and the Executive Power Clause of the Constitution. *Id.* at 617. He described the power to determine foreign relations, including the recognition and war powers,

as "a concurrent authority." *Pacificus* No. 1, in 15 THE PAPERS OF ALEXANDER HAMILTON 34, 42 (H. Syrett & J. Cooke eds., 1969). Madison, writing under pressure from Thomas Jefferson, attacked this broad construction of Executive Power, arguing that the President has no power to declare war or repeal treaties even by use of his own powers. Casto, 28 N. KY. L. REV. at 628. Even at this early stage, then, the power to manage the republic's affairs with other nations was not unanimously committed by the Founders to the executive branch.

Moreover, when Washington later considered removing the diplomatic authority of France's controversial foreign minister, "Citizen" Edmund Genet, he had Thomas Jefferson draft a message to Congress stating his intention to remove Genet's diplomatic authority *unless either house objected*. Reinstein, 46 U. RICH. L. REV. at 426-28. Though the issue became moot when France recalled Genet, this planned consultation reflects Washington's understanding of a concurrent role for Congress in discretionary (as opposed to ministerial) exercises of diplomatic authority.

The Neutrality Crisis thus stands as "important precedent for the duty of the Executive to obey the constraints of international law," but offers no basis for "developing or supporting any modern general theory of executive power." Reinstein, 46 U. RICH. L. REV. at 377-78. Consistent with that conclusion, court decisions in the decades after the Neutrality Crisis regarded the recognition power as belonging to both the President and Congress. *See United States v. Palmer*, 16 U.S. 610, 643 (1818) (stating that courts "must view such newly constituted government as it is viewed by the legislative and executive departments");

Clark v. United States, 5 F. Cas. 932, 933-34 (Cir. Ct. D. Pa. 1811) (treating recognition as an issue for either the executive or legislature, and construing an act of Congress to determine whether St. Domingo had been recognized).

2. The Haitian Revolution and the Non-Intercourse Laws.

In the midst of the Quasi War with France in 1798, Congress passed an act embargoing trade with France and her dominions. Reinstein, 86 TEMP. L. REV. at 15. (*citing* Act of June 13, 1798, ch. 53, 1 Stat. 565, 565). When the act was renewed in 1800, Congress amended the language to read that "the whole of the island of Hispaniola" will be considered part of France, even though Spain had transferred the colony of Santo Domingo by treaty but had not yet ceded actual control. *Id.* (*citing* Act of Feb. 27, 1800, ch. 10, § 7, 2 Stat. 7, 10). Congress, not the President, thus recognized the territorial limits of France.

In *Clark*, Justice Washington, while riding circuit, held that the defendant violated the 1809 embargo of France by trading with the Haitian people. 5 F. Cas. 932. *Clark* cites the Non-Intercourse Act of 1806 as a clear recognition of "the sovereignty of France over the island," which cannot be overturned by a court. *Id.* (*citing* Act of Feb. 28, 1806, ch. 9, § 1, 2 Stat. 351, 351). This was an early judicial acknowledgment of the legislative power of recognition. *See* Reinstein, 86 TEMP. L. REV. at 18.

3. Monroe and the Recognition of the South American Republics.

The earliest extended discussion of the recognition powers of the President and Congress arose during the Monroe administration, in its deliberations over

whether to recognize the new South American republics who declared independence from Spain in 1816. 1 BOUV. 1124. The Court of Appeals greatly oversimplifies this discussion, characterizing it as an instance in which the President "prevailed in a standoff" with Speaker of the House Henry Clay over the recognition power. *Zivotofsky*, 725 F.3d at 208. A more careful consideration of the historical evidence reflects acknowledgment by the executive of a concurrent role for Congress in recognition decisions.

President Monroe was uncertain of his recognition power, and sought advice from his Cabinet. Julius Goebel, THE RECOGNITION POLICY OF THE UNITED STATES 120 (1915); 6 THE WRITINGS OF JAMES MONROE 31 (1969). Secretary of State John Quincy Adams argued that Congress should not have "any share in the act of recognition," because it was "an act of the Executive authority." John Bassett Moore and Francis Wharton, 1 A DIGEST OF INTERNATIONAL LAW § 75 at 244 (1906) ("MOORE INT. L. DIG."); Goebel, RECOGNITION POLICY at 121-23. Secretary of the Treasury William H. Crawford and Attorney General William Wirt advised obtaining the consent of Congress, because the Senate must act upon the nomination of any minister and the House must assent to the necessary appropriations. John Quincy Adams, 4 MEMOIRS OF JOHN QUINCY ADAMS 204-06 (1875). Monroe agreed with Crawford and Wirt, stating that the better course of action would be for Congress to be "pledged beforehand" to recognition. *Id.*; 1 MOORE INT. L. DIG. § 75 at 244.

In Congress, meanwhile, Clay announced his intention to pursue recognition of the South American republics, and introduced various bills and resolutions from 1818 to 1821 appropriating funds to that end.

Goebel, RECOGNITION POLICY at 121, 131-33; 32 Annals of Congress, 15th Cong., 1st Sess., vol. ii, at 1469 (1818); Samuel Flagg Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES 200 (1936). Clay argued that both the President (under the powers to receive and send ministers) and Congress (under the Declare War and Commerce Clauses and its appropriations power) had recognition authority. 1 BOUV. 1124-25 (*citing* 32 Annals of Congress, 15th Cong., 1st Sess., vol. ii, at 1468, 1607-08, 1616, 1618, 1655).

Though Clay's appropriation bill was defeated as noted by the Court of Appeals, he proposed a concurrent resolution to give President Monroe the "Constitutional support" of Congress when "he may deem it expedient to recognize the sovereignty and independence" of these new nations. Goebel, RECOGNITION POLICY at 133. This passed by "large majorities" in each house. *Id.* Historians have treated the first bill as defeated not out of constitutional concerns, but from differing views on "foreign policy and partisan politics." Reinstein, 86 TEMP. L. REV. at 20 (citing Samuel Flagg Bemis, THE LATIN AMERICAN POLICY OF THE UNITED STATES: AN HISTORICAL INTERPRETATION 36-47 (1943); Frederic L. Paxson, THE INDEPENDENCE OF THE SOUTH AMERICAN REPUBLICS: A STUDY IN RECOGNITION AND FOREIGN POLICY 174 (2d ed. 1916)). Congressional recognition of the former Spanish colonies was a roadblock to the treaty negotiated with Spain that eventually ceded Florida into the Union. *Id.* at 24–25. Clay's actions in the house, even though unsuccessful, delayed Spanish ratification by two years. *Id.*

On March 8, 1822, Monroe delivered a message to Congress communicating "the sentiments of the executive" on recognition and seeking "cooperation

between the two departments of the government[.]" 1 BOUV. 1126; American State Papers, Political Condition of the Spanish Provinces of South America, 17th Cong., 1st Sess., No. 327 (Mar. 8, 1822). Monroe expressed his judgment that the time had come to recognize the republics, and requested "the necessary appropriations for carrying it into effect." 1 BOUV. 1126. Congress approved his request. *Id.* *See also* 1 MOORE INT. L. DIG. § 75 at 245; Bemis, A DIPLOMATIC HISTORY at 200-01. The Senate committee on Foreign Affairs approved unanimously, and the House appropriated $100,000 to give effect to the recognition. Goebel, RECOGNITION POLICY at 136.

In harmony with this example, William Rawle's early commentary on recognition stated that the President's decision is "binding" unless countermanded, but that Congress "possesses a superior power" of recognition, and "may declare its dissent from the executive recognition or refusal[.]" 1 BOUV. 1129 (*quoting* William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 195-96 (2d ed. 1829)). *See also* 1 BOUV. 1129-30 (*quoting* Joseph Story, COMMENTARIES ON THE CONSTITUTION § 1560 (1833)) (stating that Congress might override an executive recognition decision, but that the issue remained "open to discussion"). The Supreme Court likewise treated recognition as an area of primarily legislative authority. *See Cherokee Nation v. State of Georgia*, 30 U.S. 1, 46-47 (1831) (stating that the court must "conform its decisions to the will of the legislature" on acts of recognition).

4. Jackson and the Texas Debate.

The next discussion of recognition centered on the Republic of Texas, which began seeking recognition from the United States in 1835. *See* 1 BOUV. 1126-27.

President Jackson was concerned that recognition would split the Democratic Party and could lead to war with Mexico. Thomas A. Bailey, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 242 (9th ed. 1974). Congress favored recognition, and passed resolutions that the independence of Texas should be recognized upon "satisfactory information" of an operational civil government. Cong. Globe, 24th Cong., 1st Sess. 453 (1836); H.R. Rep. No. 24-854 (1836). The Senate Committee on Foreign Affairs reported a resolution stating that recognition "may be made by the United States in several ways," including by treaty, by statute, or by sending or receiving diplomatic agents. 1 BOUV. 1126-27; 24 Gales & Seaton's Register of Debates, Senate, 24th Cong., 1st Sess. 1847-48 (June 18, 1836). The Senate report also stated that, where the President has failed to act, he "may be quickened in the exercise of his power" by act of Congress. 1 BOUV. 1127; 24 Gales & Seaton's Register 1848.

Jackson delivered a message to Congress on December 22, 1836, conceding that there had never been any "deliberate inquiry" into whether the President or Congress held the recognition power. 1 BOUV. 1127; 24 Gales & Seaton's Register of Debates, House, 24th Cong., 2nd Sess. 1137-40 (Dec. 22, 1836) He added that he was "disposed to concur" with the view that "recognizing the independence of Texas should be left to the decision of congress," as doing so would afford the "fullest satisfaction" to the people of the United States. *Id.* Jackson opined that the recognition of Texas was premature, but that if Congress disagreed, "I shall promptly and cordially unite with you." *Id.* Historian Julius Goebel explained that "Jackson saw greater guarantees" of separation of powers "[i]n congressional control over recognition" as they were the "body by whom war can alone be

declared." Goebel, RECOGNITION POLICY at 158. Jackson did not claim exclusive recognition authority and was even willing to be bound by a congressional determination evincing at least shared, if not superior, power of recognition in the legislature.

On February 28, 1837 and March 1, 1837, the House and Senate passed resolutions appropriating funds for a diplomatic agent to Texas, and in the case of the Senate resolution, stating that the "independent political existence" of Texas should be acknowledged by the United States. Cong. Globe, 24th Cong., 2nd Sess. 83, 194, 214 (1837). *See also* 1 BOUV. 1127; 1 MOORE INT. L. DIG. § 75 at 245. On his last day in office, March 3, 1837, Jackson recited the resolutions, stated that he felt it was his "duty to acquiesce therein," and appointed a chargé d'affaires to Texas. Andrew Jackson, *Message to the Senate* (Mar. 3, 1837), in 3 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 281-82 (1902).

5. Polk and the Palermo Controversy.

In 1848, a question of recognition arose during the Polk administration, when the consul of the United States at Palermo, without authorization, recognized the independence of Sicily. 1 MOORE INT. L. DIG. § 41, at 117-18. On October 31, 1848, Secretary of State (and future President) James Buchanan wrote to the consul instructing him that the recognition was a nullity. Buchanan described recognition as an "act of high sovereign power," and stated that, "In the United States, such a recognition is usually effected, either by a nomination to, and confirmation by the Senate of a Diplomatic or Consular agent to the new Government, *or by an act of Congress*." *Id.* § 75 at 245-46 (*quoting* 10 MS. Dispatches to Consuls 489) (emphasis added). Buchanan noted that "[t]he latter course was adopted,

in the recognition of the independence of the Spanish-American Republics." *Id.* at 246.

6. Taylor and the Hungarian Revolution.

In 1848, Hungary revolted against the Habsburg monarchy of Austria and sought an independent republic. On June 18, 1849, Secretary of State John Clayton dispatched Ambrose Dudley Mann as a special agent to investigate. Clayton instructed that, should the new government of Hungary prove to be firm and stable, "the president will cheerfully *recommend to congress*, at their next session, the recognition of Hungary," and had no doubt that "her independence would be speedily recognized by that enlightened body." Letter from Clayton to Mann (June 18, 1849), *in* Zachary Taylor, Message from the President of the United States: Communicating Copies of the Correspondence with the Agent employed to visit Hungary during the Recent War between that Country and Austria, S. Exec. Doc. No. 31-43, at 5-6 (1850) (emphasis added). *See also* 1 BOUV. 1127.

B. The President's Shift Towards a More Assertive Executive Recognition Power, While Still Acknowledging a Concurrent Role for Congress.

Presidential administrations began in the mid-1800s to adopt a more robust view of executive recognition power. Even as this more assertive view emerged, however, the President continued to acknowledge and Congress continued to claim an important, concurrent legislative role.

1. Pierce and the Consular Remodeling Statute.

The Pierce administration was the first to allude to executive ascendancy in diplomatic recognition, but stopped short of asserting plenary authority. On June 2, 1855, Attorney General Caleb Cushing issued an opinion construing a law remodeling the consular system, which provided that the President "shall" appoint consuls in certain places, including Haiti. 1 BOUV. 1126 (*quoting* 7 Op. Attys. Gen. 242, in Ellery C. Stowell, CONSULAR CASES AND OPINIONS (1909)). Cushing interpreted this to mean that the President "may" appoint such consuls "if he *See* fit," because requiring the President to appoint a consul would have the effect of commencing diplomatic relations with Haiti, a role that Cushing argued the Constitution "has intrusted [sic] to the sole discretion of the executive." *Id.* at 242, 245, 250. Even as he asserted "sole discretion," however, Cushing also acknowledged that Congress had significant concurrent authority with respect to the descriptions, functions, compensation, and appointment of consular officers. *Id.* at 248. This concurrent authority soon manifested in a significant role for Congress during the Lincoln administration over whether to recognize Haiti.

2. Lincoln and the Recognition of Haiti, Liberia, and Mexico.

Early recognition decisions during the Lincoln administration evoked the deferential attitudes of the Monroe, Jackson, Polk, and Taylor administrations. In his first message to Congress in December 1861, Lincoln urged the recognition of Haiti and Liberia, but stated that he was "[u]nwilling" to "inaugurate a novel policy in regard to them without the approbation of Congress," and therefore submitted to Congress "for

your consideration the expediency of an appropriation for maintaining a chargé d'affaires near each of those new States[.]" *Lincoln's First Annual Message to Congress* (Dec. 3, 1861), *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 47 (James D. Richardson ed., 2004). *See also* 1 MOORE INT. L. DIG. § 75, at 244. A year later, Congress enacted a law authorizing the President to appoint diplomatic representatives to Haiti and Liberia. Cong. Globe, 32nd Cong., 2nd Sess. 1814-15 (April 24, 1862); *Id.* at 2536 (June 3, 1862). This went further than a mere "appropriation" as construed by the Court of Appeals, *Zivotofsky*, 725 F.3d at 210, and specifically instructed the executive to appoint a representative to those nations and thus legislatively recognized them. *See* Reinstein, 86 TEMP. L. REV. at 31. In November 1864, the Senate ratified a "treaty of friendship" with Haiti and then Liberia shortly thereafter. Charles H. Wesley, *The Struggle for the Recognition of Haiti and Liberia as Independent Republics*, 2 J. NEGRO HIS. 369, 382 (Oct. 1917).

Three years later, Lincoln was more assertive with regard to the recognition of Archduke Ferdinand Maximilian von Habsburg as Emperor of Mexico following France's intervention in the region. *See* Martha Mechaca, NATURALIZING MEXICAN IMMIGRANTS 42-43 (2011). Viewing these events as a violation of the Monroe Doctrine, the House of Representatives unanimously passed a resolution on April 6, 1864, stating that the United States does not "acknowledge any monarchical government erected on the ruins of any republican government in America under the auspices of any European power," and supporting ousted president Benito Juárez. *Id.* at 43; 1 BOUV. 1127; Cong. Globe, 38th Cong. 1st Sess. 1408 (1864).

The French government requested an explanation. Secretary of State William Seward responded in a letter to William Dayton, Minister to France, on April 7, 1864, stating that the House resolution "truly interprets the unanimous sentiment of the people of the United States in regard to Mexico," but adding that the decision whether to adopt that position "is a practical and purely executive question, and the decision of it constitutionally belongs, not to the House of Representatives, nor even to Congress, but to the President of the United States." *Letter from William Seward to William Dayton* (Apr. 7, 1864), in Cong. Globe, 38th Cong. 1st Sess. 2475.

Yet Seward also stated that the President received the House Resolution "with the profound respect to which it is entitled, as an expression of its sentiments upon a grave and important subject." *Id.* Indeed, in a letter a day earlier from Seward to French minister M.L. De Geofroy, Seward declared that, "this government has long recognized, and still does continue to recognize, the constitutional government of the United States of Mexico as the sovereign authority in that country, and the President Benito Juárez as its chief," while adopting a position of "absolute neutrality" between the belligerents. 1 EXECUTIVE DOCUMENTS PRINTED BY ORDER OF THE HOUSE OF REPRESENTATIVES DURING THE FIRST SESSION OF THE THIRTY-NINTH CONGRESS, 1865-66, at 359 (1866).

Congress did not capitulate to Seward's view of executive primacy on recognition. Immediately following Seward's letter, the House Committee on Foreign Affairs expressed its shock at the "novel and inadmissible" idea that the President had sole authority of recognition. Goebel, RECOGNITION POLICY at 196–97. On December 15, 1864, it passed a

resolution affirming its right to an "authoritative voice" in "the recognition of new powers," and stating that "it is the constitutional duty of the President to respect that policy[.]" 1 BOUV. 1127; Cong. Globe, 38th Cong. 2nd Sess. 48 (1864). The debate ended unresolved when Juárez's military supporters overthrew the Maximilian government in 1867. Two decades later, however, the Supreme Court still regarded recognition of a foreign power "as appearing from the public acts of the *legislature* and executive[.]" *Jones v. United States*, 137 U.S. 202, 214 (1890) (emphasis added).

3. Cleveland, McKinley, and the Cuban Recognition Debate.

The contending positions of the past century culminated in a debate under the Cleveland and McKinley administrations regarding the recognition of Cuba's independence following its insurrection against Spain in 1896-1897. On December 21, 1896, the Senate Committee on Foreign Relations unanimously recommended a joint resolution, "[t]hat the independence of the Republic of Cuba be, and the same is, hereby acknowledged by the United States of America." *Notes on International Law*, 43 AM. L. REV. 266, 276 (1909); 1 BOUV. 1124. The resulting debate laid out competing views regarding the recognition powers of the President and Congress.

Secretary of State Richard Olney expressed the "extreme view of the prerogative of the executive on this subject," asserting that the power of recognition "rests exclusively with the executive," and that a congressional resolution "is important only as advice of great weight voluntarily tendered to the executive regarding the manner in which he shall exercise his constitutional functions." 1 BOUV. 1124. Senator

Eugene Hale presented a similar view in a memorandum submitted to the Senate in early January 1897, describing recognition as "an act of the executive (president alone, or president and senate), and not of the legislative branch of the government," but finding it "most advisable as well as proper for the executive first to consult the legislative branch as to its wishes and postpone its own action, if not assured of legislative approval." *Id.* at 1125 (*quoting* Cong. Rec. 54th Cong. 2nd Sess. 663 (1897)); Eugene Hale, Power to Recognize the Independence of a New Foreign State, 54th Cong., 2nd Sess., Senate Doc. No. 56 (1897). *See also* Edward Stanwood, 2 A HISTORY OF THE PRESIDENCY, FROM 1897 TO 1909 12 (1912).

Senator Augustus Bacon, by contrast, argued that congressional recognition was "necessary" if war was a possible outcome, that it was "the proper department of the government to act," and that it at least "has the power to act even if its power is not exclusive." 1 BOUV. 1124-25. Senator Roger Mills agreed, proposing a resolution to recognize Cuba and declaring that "the expedience of recognizing a foreign government belongs to Congress[.]" *Cuba and Spain*, THE OUTLOOK 226 (Jan. 16, 1897). *See also* Stanwood, 2 A HISTORY OF THE PRESIDENCY at 12.

In a notable exchange, Senator Hale acknowledged under questioning that, of the more than one hundred cases of recognition he had researched from "the history of this country for a hundred years," he did not find a single instance in which relations had been determined by the act of recognition by the President without Congress. 1 BOUV. 1125-26 (*quoting* Cong. Rec. 54th Cong. 2nd Sess. 682). Rather, "[i]n every one of the cases," recognition "was made by the executive

department, acted upon, submitted to, and not questioned" by Congress. *Id.*

McKinley ultimately sent a special message to Congress on April 11, 1897, recommending and giving his reasons for intervention in Cuba. *Id.* at 1127. Congress responded with a joint resolution on April 20, 1897, declaring that the people of Cuba were free and independent, demanding that Spain relinquish its authority and government in the island, and authorizing the President to use military force to carry the resolutions into effect. *Id.* (*citing* 6 MOORE INT. L. DIG. § 909). Thus, McKinley "acted in accordance with the view . . . of his predecessors, Presidents Monroe and Jackson, in consulting congress and securing its joint action in a case which was likely to result in war." *Id.* at 1127-28.

The Court of Appeals is correct that the proposed language from 1896 recognizing the "Republic of Cuba" was removed from the final resolution, *Zivotofsky*, 725 F.3d at 210, but the joint resolution that came out of conference did recognize that Spain no longer had sovereignty over its former colony. Reinstein, 86 TEMP. L. REV. 40–41. In Joint Conference, the House allowed the bill to recognize Spain's loss of control, and the Senate agreed to drop the explicit recognition of any revolutionary government. *Id.* at 41. This compromise was acceptable to President McKinley and was signed just three days before Spain declared war on the United States. *Id.*

C. The Power of Recognition in the Modern Era.

Unlike the constitutional authority debates of the Nineteenth Century, the pattern emerging by the mid-Twentieth Century and continuing since has been

more pragmatic. The President now generally initiates action on recognition decisions, and Congress often acquiesces, but at times exercises its own authority to define the limits of recognition. The President then conforms his policies to the acts of Congress.

The case of Taiwan is instructive. From 1949 until the end of 1978, the United States recognized the governing authorities on Taiwan as the Republic of China ("ROC" or "Taiwan"). That changed following rapprochement with the People's Republic of China ("PRC"). On December 15, 1978, the Carter administration announced that the United States would recognize the PRC on January 1, 1979, and would terminate diplomatic relations and its mutual defense treaty with Taiwan. *See* Reinstein, 45 U. RICH. L. REV. at 804-05; Richard Holbrooke, *The Day the Door to China Opened Wide*, Washington Post (Dec. 15, 2008). As part of this diplomatic shift, the Carter administration proposed a law defining how the United States would conduct business with Taiwan, including arms sales, without formal relations. *Id.* Congress revised the proposed draft extensively. *See* 125 Cong. Rec. S2570-2602 (daily ed. Mar. 13, 1979); 125 Cong. Rec. H1255-1289 (daily ed. Mar. 13, 1979); H.R. Conf. Rep. No. 96-71, 96th Cong., 1st Sess. (Mar. 24, 1979). It then passed the Taiwan Relations Act on April 10, 1979, Pub. L. No. 96-8, 93 Stat. 14 (Apr. 10, 1979), *codified* at 22 U.S.C. §§ 3301 *et seq*.

Among its provisions, the new law authorized *de facto* diplomatic relations with the "governing authorities on Taiwan," stated that any international agreements made between Taiwan and the United States before 1979 were still valid unless otherwise terminated, and provided for Taiwan to be treated the

same as "foreign countries, nations, states, governments, or similar entities[.]" Reinstein, 45 U. RICH. L. REV at 804-05. Carter signed the act, declaring that the statute "will enable the American people and the people of Taiwan to maintain commercial, cultural, and other relations without official Government representation and without diplomatic relations." Jimmy Carter, Taiwan Relations Act Statement on Signing H.R. 2479 Into Law (Apr. 10, 1979). Thus, the President initiated the (non-)recognition decision, but Congress subsequently imposed limits that the President accepted.

The Taiwanese Relations Act amounted to *de facto* recognition by Congress, because it treated Taiwan as a foreign sovereign in all but name. Reinstein, 86 TEMP. L. REV. at 49. The Foreign Minister of the PRC objected to the bill as "equivalent to recognizing Taiwan as a country[.]" *Id.* (*citing* Telegram from the Embassy in China (Woodcock) to the Department of State (Mar. 16, 1979), in 8 U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 1977-1980: CHINA 835, 837). The congressional action on Taiwan, like the Cuban resolution in 1898, is an expression of shared power because Congress defined the exact expressions of the recognition desired by the President. *Id.* In both instances, Congress strengthened the President's proposal and did everything short of formal recognition of the government at issue. *Id.*

III. THE ISSUANCE OF PASSPORTS IS AN AREA OF TRADITIONAL LEGISLATIVE AUTHORITY IN WHICH THE PRESIDENT HAS FAITHFULLY EXECUTED CONGRESSIONAL DIRECTIVES

With respect to the "passport power," the Court of Appeals acknowledged "it is clear that the Congress

has exercised its legislative power to address the subject of passports," but further concluded that Congress does not have "exclusive control over all passport matters" and found "the Executive branch has long been involved in exercising the passport power, especially if foreign policy is implicated." *Zivotofsky*, 725 F.3d at 215. This again oversimplifies and misconstrues the history to erroneous ends. In contrast to the oft-contested recognition power, the historical record of legislative predominance with respect to the passport power is clear. From the ratification of the Constitution through the present, Congress has consistently exercised legislative authority over passports, and the President has carried out its directives.

The Continental Congress first gave responsibility to the Department of Foreign Affairs to issue United States passports in 1782. Craig Robertson, THE PASSPORT IN AMERICA: THE HISTORY OF A DOCUMENT 26 (2010). Upon ratification of the Constitution, Congress derived its legislative power over the issuance and control of passports from multiple constitutional provisions. Congress has the exclusive authority to legislate "Naturalization" and "Commerce with foreign Nations." U.S. CONST. art. I, §§ 1, 8. Bundled within the power to regulate commerce is the power to regulate the movement of people, affording Congress legislative authority over immigration as well. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824). "It is beyond dispute that Congress's immigration, foreign commerce, and naturalization powers authorize it to regulate passports." *Zivotofsky*, 725 F.3d at 221 (Tatel, J., concurring).

Congress passed its first passport law in 1790, providing punishment for the violation of United

States passports. Robertson, THE PASSPORT IN AMERICA at 26 (*quoting* 1 Stat. 118: Rev. State 4062 (1790)). The newly renamed Department of State issued passports as travel passes that asked a foreign government to allow a holder to enter a country, move about freely for lawful pursuits, and receive aid and protection that the United States would give its own citizens. *Id.* at 26.

Before 1856, issuing passports was not exclusively federal; governors, mayors, and notaries public could legally issue them. *Id.* at 131; *Zemel v. Rusk*, 381 U.S. 1, 31 (1965) (Goldberg, J., dissenting). These non-federal officials also issued certificates of citizenship and letters of introduction to foreign officials which, in the eyes of foreign governments, called into question the legitimacy of United States passports. Robertson, THE PASSPORT IN AMERICA at 140-41. To address the resulting "confusion abroad," Congress passed the Act of August 18, 1856, ch. 164, § 1, 11 Stat. 119, declaring that passports could only be issued to citizens, giving the State Department sole authority to issue passports under "such rules as the President shall designate and prescribe," and making it illegal for any other authority to issue a passport. *Id.* at 131, 141; *Zemel*, 381 U.S. at 31-32 (*quoting* 11 Stat. 60 (1856)).

Congress repealed part of the Act of August 18, 1856 in March 1863, to allow the State Department to issue passports during the Civil War to noncitizens. Robertson, THE PASSPORT IN AMERICA at 254 (*citing* 12 Stat. 754 (1863)). In 1866, Congress reinstated the citizenship requirement. *Id.* (*citing* 14 Stat. 54: Rev. Stat. 4076, 4078 (1866)). In 1902 and 1907, Congress granted certain passport powers to governors of United States insular possessions and to the State

Department. *Id.* at 255-56 (*citing* 32 Stat. 386 (1902), 34 Stat. 1228 (1907)).

The most unmistakable instance of executive acquiescence in congressional passport authority followed the United States' entry into World War I. At the end of 1917, the State and Labor Departments attempted to impose a requirement that all aliens who intended to enter United States territory have a visa issued by a consul of the United States. *Id.* at 187. The Attorney General ruled that the executive did not have authority to impose such a requirement. *Id.* *See also* Control of Travel From and Into the United States: Hearings on H.R. 10264 Before the H. Comm. on Foreign Affairs, 65th Cong. 2nd Sess. (1918). The Attorney General did offer the possibility of issuing certificates of citizenship, but the State Department believed that the only certificate of citizenship issued by the executive should be the U.S. passport. Robertson, THE PASSPORT IN AMERICA, at 187; *See* Letter from Robert Lansing, Secretary of State, to Thomas Gregory, Attorney General (Sept. 19, 1917) (on file with the National Archives) ("I cannot with propriety or out of regard to the proper conduct of international relations sanction any plan which would tend to minimize the importance and significance and value of the American passport.").

Following the Attorney General's ruling, the President asked the Secretary of State "to urge upon Congress the passage of the necessary enabling legislation[.]" Control of Travel, 65th Cong., 2nd Sess. Congress responded with the Passport Control Act of 1918, delegating to the President the power in wartime to control the travel of citizens and others to

and from the United States. Robertson, THE PASSPORT IN AMERICA at 187; 40 Stat. 559 (1918). The President could "impose specific restrictions on aliens wishing to enter or leave the country." John Torpey, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE 117 (2000). Congress clearly had national security at the forefront of its intentions in that it described the act as: "An Act to prevent in time of war departure from or entry into the United States contrary to the public safety." *Id.* (*quoting* 40 Stat. 559 (1918); *see also Haig v. Agee*, 453 U.S. 280, 296-97 (1981) ("By enactment of the first travel control statute in 1918, Congress made clear its expectation that the Executive would curtail or prevent international travel by American citizens if it was contrary to the national security.").

A few months after Congress passed the Passport Control Act of 1918, President Wilson issued an executive order commanding that "hostile aliens must obtain permits for all departures from, and entries into, the United States." Torpey, THE INVENTION OF THE PASSPORT at 117 (*quoting* Exec. Order No. 2932 (Aug. 8, 1918)). Congress revised the act in 1919 to apply only to individuals seeking to enter the United States, and to eliminate the requirement that the country be at war. *Id.* Congress revoked the act following the conclusion of World War I. Robertson, THE PASSPORT IN AMERICA at 203, 258 (citing 41 Stat. 1217 (1921)).

With the Passport Act of 1926, Congress essentially reenacted the Act of August 18, 1856 and repealed all other passport laws. Robertson, THE PASSPORT IN AMERICA at 258; *Zemel*, 381 U.S. at 30, 32 (quoting 44 Stat. 887, 22 U.S.C. § 211a (1926)). Today, passport law is codified at 22 U.S.C. §§ 211a *et seq*. Current law

authorizes the Secretary of State to grant and issue passports under such rules as the President may designate. 22 U.S.C. § 211a.

This executive discretion, however, comes through legislative grant alone, and is expressly subject to statutory boundaries set by Congress. *See*, *e.g*., 22 U.S.C. § 211a (disallowing most travel and use restrictions upon passports); 22 U.S.C. § 212(a)(b)(1) (disallowing passports to persons convicted of sex tourism); 22 U.S.C. § 2714 (disallowing passports to persons convicted of drug trafficking); *see also Zemel*, 381 U.S. at 7-8 (holding that Congress statutorily authorized the Secretary of State in the Passport Act of 1926 to refuse to validate United States citizens' passports for travel to Cuba); *Kent v. Dulles*, 357 U.S. 116, 130 (1958) (holding that the Secretary of State could not withhold passports to citizens based on their affiliations with the Communist party because Congress did not expressly grant the Secretary the authority to do so).

Indeed, the President has previously acquiesced to congressional exercise of the passport power under circumstances closely analogous to this case. Congress has enacted a passport law for Taiwan that is virtually identical to Section 214(d), and the President has complied with its directives. In 1994, Congress amended the Foreign Relations Authorization Act to provide that the Secretary of State "shall permit" United States citizens born in Taiwan to list "Taiwan" as their place of birth in passports and consular reports of birth abroad. Pub. L. No. 103-236, title I § 132, 108 Stat. 395 (Apr. 30, 1994), *as amended* by Pub. L. No. 103-415 § 1(r), 108 Stat. 4302 (Oct. 25, 1994). The executive has complied. The U.S. Department of State Foreign Affairs Manual ("FAM") directs

that "Taiwan" shall be printed as the place of birth for an applicant born in Taiwan who writes "Taiwan" on his or her passport application. 7 FAM 1340 App. D § d(6)(d). Thus, while the Court of Appeals is correct that the President has been "involved in exercising the passport power," his involvement has at all times been subordinate to and in compliance with congressional directives.

IV. THE EXERCISE OF LEGISLATIVE AUTHORITY TO PERMIT AMERICAN CITIZENS BORN IN JERUSALEM TO IDENTIFY "ISRAEL" AS THEIR PLACE OF BIRTH IS CONSISTENT WITH THE HISTORICAL AUTHORITY OF CONGRESS IN THE AREAS OF RECOGNITION AND PASSPORTS

Based on its mistaken views of the recognition power as an exclusively executive authority and the passport power as a sphere of coequal authority, the Court of Appeals concluded that Section 214(d) "interferes with the President's exclusive recognition power" by running "headlong into a carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem." *Zivotofsky*, 725 F.3d at 216. Yet even assuming, *arguendo*, that Section 214(d) expresses through an exercise of the passport power a congressional view on the recognition of Jerusalem as part of Israel that runs against executive branch policy, it remains a valid and constitutional exercise of Congress's authority.

Contrary to the Court of Appeals' conclusions, the historical record teaches that Congress has long occupied the field of recognition as a coordinate and coequal power. *See* Section II, *supra*. Congress has also long held the central position in passport law,

creating, defining, and limiting by statute the President's authority to issue passports. *See* Section III, *supra*. Section 214(d) is thus an ordinary exercise of congressional authority in the areas of the recognition power and the passport power, not an infringement of any "exclusive" executive power.

The relationship between the President and Congress in the recognition of foreign governments, at least insofar as Congress's exercise of the passport power is concerned, is analogous to the status of executive agreements entered into by the President to resolve foreign claims. The Constitution vests no express power to make such executive agreements, but it has been a consistent practice stretching back to the Adams and Monroe administrations. *See* Anne E. Nelson, *Note, From Muddled to Medellín: A Legal History of Sole Executive Agreements*, 51 ARIZ. L. REV. 1035, 1036-42 (2009).

In *Dames & Moore v. Regan*, 453 U.S. 654, 675-88 (1981), the Supreme Court upheld the President's authority to make an executive agreement ending the Iranian hostage crisis. The Court applied the tripartite classification of executive action from Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952). Crucial to the Court's determination was its finding that "Congress has not disapproved of the action taken here." *Dames & Moore*, 453 U.S. at 687. The Court also "re-emphasize[d]" that "[w]e do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities," but instead was "not prepared to say that the President lacks the power to settle such claims" where "we can conclude that Congress acquiesced in the President's

action[.]" *Id.* at 688. *See also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (same).

The practical implications of these statements struck home in *Medellín v. Texas*, 552 U.S. 491 (2008), where the Court held that the President did not have the unilateral authority to issue a memorandum requiring state courts to give effect to a ruling of the International Court of Justice. *Id.* at 523-32. The Court distinguished the executive agreement cases, noting that there was no "particularly longstanding practice" of congressional acquiescence to such memoranda. *Id.* at 532. The Court also reiterated that, "[p]ast practice does not, by itself, create power." *Id.* at 531-32 (*quoting Dames & Moore*, 453 U.S. at 686). For the same reason, this Court has held that an executive agreement may be constrained or overridden by an act of Congress. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 235 (D.C. Cir. 2003), *cert. denied*, 524 U.S. 915 (2004).[2]

In recognition decisions, like executive agreements, the President has often enjoyed congressional support or acquiescence. *See* Section II, *supra*. That historical record, however, is hardly unbroken. Even where the President and Congress have cooperated, Congress has often asserted its own recognition power, and the President has acceded at times to the view that Congress has greater recognition authority. *Id.* That includes, in the case of Taiwan, carrying out

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[2] *See also Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 182-83 (2nd Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955); *Swearingen v. United States*, 565 F. Supp. 1019, 1021 (D. Colo. 1983); *Indep. Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 620 (D.D.C. 1980).

congressional directions on the labeling of passports that contradict the President's non-recognition of Taiwan. *See* Section III, *supra*. Where Congress has so acted, the President's power is at its "lowest ebb[.]" *Youngstown*, 343 U.S. at 637. On those occasions, the President has often yielded to or cooperated with Congress on questions of recognition. *See* Section II, *supra*.

Here, the authority of Congress in enacting Section 214(d) is magnified by the fact that Congress is exercising its power in a field of traditional congressional predominance—the regulation of passports. The President exercises his defined authority to prescribe passport rules pursuant to an express grant of authority by Congress, and subject to express statutory limits. *See* Section III, *supra*; 22 U.S.C. §§ 211a *et seq*. To the extent that Section 214(d) implicates the recognition power at all, its effect is minimal, as it neither grants nor rescinds recognition of Israel or the Palestinian Authority, nor modifies the United States' diplomatic relationship with either authority, but merely permits United States citizens born in Jerusalem to choose to identify "Israel" as their country of origin. That falls squarely within the historical sphere of congressional authority over the issuance and contents of passports. Consequently, the President is obligated to "take Care that the laws be faithfully executed," U.S. CONST. art. II, § 3, and must enforce and give effect to Section 214(d).

CONCLUSION

"With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." *Youngstown*, 343 U.S. at 655 (Jackson, J., concurring). Congress has deliberated and has concluded that United States citizens born in Jerusalem should be permitted to identify their place of birth as Israel. The President may disagree with that decision, but it falls squarely within long-recognized areas of congressional authority, and infringes no plenary zone of executive authority. For these reasons, AJC respectfully submits that Section 214(d) is constitutional and should be upheld.

Respectfully submitted,

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