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CHAPTER 9

Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues

A. DIPLOMATIC RELATIONS

1. Central African Republic

As discussed in *Digest 2013* at 251, the United States suspended operations of its embassy in Bangui, Central African Republic in 2013. On September 15, 2014, the State Department announced that the United States was resuming operations at the embassy in Bangui. See John Kerry Press Statement, available at www.state.gov/secretary/remarks/2014/09/231632.htm. Secretary Kerry's press statement explains that the Central African Republic had made progress in its transition from violence to peace and stability, including by establishing a transitional government and cooperating with a UN peacekeeping mission. See section B.2. *infra* for discussion of U.S. relations with the transitional government. For further discussion of the UN peacekeeping efforts in the Central African Republic, see Chapter 17.

2. Syria

On March 18, 2014, the State Department suspended the operations of the Syrian Embassy in Washington and Honorary Syrian Consulates in Michigan and Texas and terminated the status of the remaining diplomatic and consular personnel. Embassy personnel who were not U.S. citizens or lawful permanent residents were required to depart by March 31, 2014, following which date the United States no longer regarded the previously-accredited embassy personnel as entitled to privileges and immunities. The United States maintained diplomatic relations with Syria.

3. Cuba

On December 17, 2014, President Obama announced that the United States would begin the process of restoring diplomatic relations with Cuba. For a discussion of the process of removing Cuba from the list of state sponsors of terrorism and lifting other sanctions, see Chapter 16. Roberta S. Jacobson, Assistant Secretary of State in the Bureau of Western Hemisphere Affairs, held a special briefing on December 18, 2014 to discuss next steps in changing U.S. policy toward Cuba. A full transcript of the briefing with Secretary Jacobson is available at www.state.gov/r/pa/prs/ps/2014/12/235405.htm. The briefing included the following remarks on the legal process of restoring diplomatic relations:

That process is relatively straightforward, frankly, from a legal perspective. Countries agree, as we did yesterday, that we will begin the process of restoration of diplomatic relations. We can do that via an exchange of letters or of notes. It doesn't require a formal sort of legal treaty or agreement. But what they do require is that both countries come to the agreement on the process, right. And obviously, it requires us also terminating the 53-year agreement that we've had with the Swiss Government as our protecting power, and the same for the Cubans. So that will be done as soon as possible, whereupon we would transition to becoming an embassy, and we would change the sign on our mission. We would obviously then, instead of having all of our officers be officers under the Swiss protection, they would be officers and we would have our diplomatic list of officers declared to the Cuban Government instead of through the Swiss, et cetera.

B. STATUS ISSUES

1. Ukraine

In the face of Russian intervention in Ukraine in 2014, the United States consistently maintained its support for Ukraine's sovereignty, political independence, unity, and territorial integrity within its internationally recognized borders. For discussion of U.S. and international sanctions imposed on Russia relating to its actions in Ukraine, see Chapter 16. On March 1, 2014, after Russian President Vladimir Putin received authorization from the Russian parliament for Russian troops to act in Crimea, Secretary of State John Kerry issued the following press statement on the situation in Ukraine, available at www.state.gov/secretary/remarks/2014/03/222720.htm.

The United States condemns the Russian Federation's invasion and occupation of Ukrainian territory, and its violation of Ukrainian sovereignty and territorial integrity in full contravention of Russia's obligations under the UN Charter, the Helsinki Final Act, its 1997 military basing agreement with Ukraine, and the 1994 Budapest Memorandum. This action is a threat to the peace and security of Ukraine, and the wider region.

I spoke with President Turchynov this morning to assure him he had the strong support of the United States and commend the new government for showing the utmost restraint in the face of the clear and present danger to the integrity of their state, and the assaults on their sovereignty. We also urge that the Government of Ukraine continue to make clear, as it has from throughout this crisis, its commitment to protect the rights of all Ukrainians and uphold its international obligations.

As President Obama has said, we call for Russia to withdraw its forces back to bases, refrain from interference elsewhere in Ukraine, and support international mediation to address any legitimate issues regarding the protection of minority rights or security.

From day one, we've made clear that we recognize and respect Russia's ties to Ukraine and its concerns about treatment of ethnic Russians. But these concerns can and must be addressed in a way that does not violate Ukraine's sovereignty and territorial integrity, by directly engaging the Government of Ukraine.

Unless immediate and concrete steps are taken by Russia to deescalate tensions, the effect on U.S.-Russian relations and on Russia's international standing will be profound.

I convened a call this afternoon with my counterparts from around the world, to coordinate on next steps. We were unified in our assessment and will work closely together to support Ukraine and its people at this historic hour.

In the coming days, emergency consultations will commence in the UN Security Council, the North Atlantic Council, and the Organization for Security and Cooperation in Europe in defense of the underlying principles critical to the maintenance of international peace and security. We continue to believe in the importance of an international presence from the UN or OSCE to gather facts, monitor for violations or abuses and help protect rights. As a leading member of both organizations, Russia can actively participate and make sure its interests are taken into account.

The people of Ukraine want nothing more than the right to define their own future – peacefully, politically and in stability. They must have the international community's full support at this vital moment. The United States stands with them, as we have for 22 years, in seeing their rights restored.

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On March 2, the United States joined with its Group of Seven ("G-7") partners in a statement condemning Russian intervention in Ukraine. Daily Comp. Pres. Docs., 2014 DCPD No. 00136, pp 1-2. The Joint Statement by Group of Seven Leaders on the Situation in Ukraine follows.

* * * *

We, the leaders of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States and the President of the European Council and President of the European Commission, join together today to condemn the Russian Federation's clear violation of the sovereignty and territorial integrity of Ukraine, in contravention of Russia's obligations under the UN Charter and its 1997 basing agreement with Ukraine. We call on Russia to address any ongoing security or human rights concerns that it has with Ukraine through direct negotiations, and/or via international observation or mediation under the auspices of the UN or the Organization for Security and Cooperation in Europe. We stand ready to assist with these efforts.

We also call on all parties concerned to behave with the greatest extent of self-restraint and responsibility, and to decrease the tensions.

We note that Russia's actions in Ukraine also contravene the principles and values on which the G-7 and the G-8 operate. As such, we have decided for the time being to suspend our participation in activities associated with the preparation of the scheduled G-8 Summit in Sochi in June, until the environment comes back where the G-8 is able to have meaningful discussion.

We are united in supporting Ukraine's sovereignty and territorial integrity, and its right to choose its own future. We commit ourselves to support Ukraine in its efforts to restore unity, stability, and political and economic health to the country. To that end, we will support Ukraine's work with the International Monetary Fund to negotiate a new program and to implement needed reforms. IMF support will be critical in unlocking additional assistance from the World Bank, other international financial institutions, the EU, and bilateral sources.

* * * *

Ambassador Samantha Power, U.S. Permanent Representative to the UN, also condemned Russian intervention in Ukraine in response to Russia's purported justifications for military action at a UN Security Council meeting on Ukraine on March 3, 2014. Ambassador Power's statement is excerpted below and available at <http://usun.state.gov/briefing/statements/222799.htm>.

* * * *

It is a fact that Russian military forces have taken over Ukrainian border posts. It is a fact that Russia has taken over the ferry terminal in Kerch. It is a fact that Russian ships are moving in and around Sevastapol. It is a fact that Russian forces are blocking mobile telephone services in some areas. It is a fact that Russia has surrounded or taken over practically all Ukrainian military facilities in Crimea. It is a fact that today Russian jets entered Ukrainian airspace. It is also a fact that independent journalists continue to report that there is no evidence of violence against Russian or pro-Russian communities.

Russian military action is not a human rights protection mission. It is a violation of international law and a violation of the sovereignty and territorial integrity of the independent nation of Ukraine, and a breach of Russia's Helsinki Commitments and its UN obligations.

The central issue is whether the recent change of government in Ukraine constitutes a danger to Russia's legitimate interests of such a nature and extent that Russia is justified in

intervening militarily in Ukraine, seizing control of public facilities, and issuing military ultimatums to elements of the Ukrainian military. The answer, of course, is no. Russian military bases in Ukraine are secure. The new government in Kyiv has pledged to honor all of its existing international agreements, including those covering Russian bases. Russian mobilization is a response to an imaginary threat.

A second issue is whether the population of the Crimea or other parts of eastern Ukraine, are at risk because of the new government. There is no evidence of this. Military action cannot be justified on the basis of threats that haven't been made and aren't being carried out. There is no evidence, for example, that churches in [e]astern Ukraine are being or will be attacked; the allegation is without basis. There is no evidence that ethnic Russians are in danger. On the contrary, the new Ukrainian government has placed a priority on internal reconciliation and political inclusivity. President Turchinov—the acting President—has made clear his opposition to any restriction on the use of the Russian tongue.

* * * *

I note that Russia has implied a right to take military action in the Crimea if invited to do so by the prime minister of Crimea. As the Government of Russia well knows, this has no legal basis. The prohibition on the use of force would be rendered moot were sub-national authorities able to unilaterally invite military intervention by a neighboring state. Under the Ukrainian constitution, only the Ukrainian Rada can approve the presence of foreign troops.

If we are concerned about the rights of Russian-speaking minorities, the United States is prepared to work with Russia and this Council to protect them. We have proposed and wholeheartedly support the immediate deployment of international observers and monitors from the UN or OSCE to ensure that the people about whom Russia expresses such concern are protected from abuse and to elucidate for the world the facts on the ground. The solution to this crisis is not difficult to envision. There is a way out. And that is through direct and immediate dialogue by Russia with the Government of Ukraine, the immediate pull-back of Russia's military forces, the restoration of Ukraine's territorial integrity, and the urgent deployment of observers and human rights monitors, not through more threats and more distortions.

Tonight the OSCE will begin deploying monitors to Ukraine. These monitors can provide neutral and needed assessments of the situation on the ground. Their presence is urgently necessary in Crimea and in key cities in eastern Ukraine. The United States calls upon Russia to ensure that their access is not impeded.

* * * *

The United States categorically rejects the notion that the new Government of Ukraine is a “government of victors.” It is a government of the people and it is one that intends to shepherd the country toward democratic elections on May 25th—elections that would allow Ukrainians who would prefer different leadership to have their views heard. And the United States will stand strongly and proudly with the people of Ukraine as they chart out their own destiny, their own government, their own future.

The bottom line is that, for all of the self-serving rhetoric we have heard from Russian officials in recent days, there is nothing that justifies Russian conduct. As I said in our last session, Russia's actions speak much louder than its words. What is happening today is not a

human rights protection mission and it is not a consensual intervention. What is happening today is a dangerous military intervention in Ukraine. It is an act of aggression. It must stop. This is a choice for Russia. Diplomacy can serve Russia's interests. The world is speaking out against the use of military threats and the use of force. Ukrainians must be allowed to determine their own destiny. ...

* * * *

On March 5, 2014, Secretary of State John Kerry hosted a meeting in Paris with the Foreign Secretary of the United Kingdom, William Hague, and the acting Foreign Minister of Ukraine, Andriy Deshchychsia. Russia was also invited to participate in the meeting, but declined. The purpose of the meeting was to discuss the Budapest Memorandum, a memorandum signed by the Governments of the United States of America, the United Kingdom, Russia, and Ukraine in 1994.

The Group of Seven issued another joint statement on the situation in Ukraine on March 12, 2014. Daily Comp. Pres. Docs., 2014 DCPD No. 00161, p. 1 (Mar. 12, 2014). As indicated in the Joint Statement, the G-7 suspended preparations for a planned G-8 summit, to be hosted in Sochi, Russia in June, due to Russia's actions. The G-8 summit was subsequently cancelled. The March 12 G-7 Joint Statement appears below.

* * * *

We, the leaders of Canada, France, Germany, Italy, Japan, the United Kingdom, the United States, the President of the European Council and the President of the European Commission, call on the Russian Federation to cease all efforts to change the status of Crimea contrary to Ukrainian law and in violation of international law. We call on the Russian Federation to immediately halt actions supporting a referendum on the territory of Crimea regarding its status, in direct violation of the Constitution of Ukraine.

Any such referendum would have no legal effect. Given the lack of adequate preparation and the intimidating presence of Russian troops, it would also be a deeply flawed process which would have no moral force. For all these reasons, we would not recognize the outcome.

Russian annexation of Crimea would be a clear violation of the United Nations Charter; Russia's commitments under the Helsinki Final Act; its obligations to Ukraine under its 1997 Treaty of Friendship, Cooperation and Partnership; the Russia-Ukraine 1997 basing agreement; and its commitments in the Budapest Memorandum of 1994. In addition to its impact on the unity, sovereignty and territorial integrity of Ukraine, the annexation of Crimea could have grave implications for the legal order that protects the unity and sovereignty of all states. Should the Russian Federation take such a step, we will take further action, individually and collectively.

We call on the Russian Federation to de-escalate the conflict in Crimea and other parts of Ukraine immediately, withdraw its forces back to their pre-crisis numbers and garrisons, begin direct discussions with the Government of Ukraine, and avail itself of international mediation and observation offers to address any legitimate concerns it may have. We, the leaders of the G-7, urge Russia to join us in working together through diplomatic processes to resolve the current crisis and support progress for a sovereign independent, inclusive and united Ukraine. We also

remind the Russian Federation of our decision to suspend participation in any activities related to preparation of a G–8 Sochi meeting until it changes course and the environment comes back to where the G–8 is able to have a meaningful discussion.

* * * *

On March 15, 2014, Ambassador Samantha Power addressed the UN Security Council regarding the situation in Ukraine. The United States, along with all but two of the members of the Security Council, voted in favor of a resolution that would have urged countries to reject the results of a referendum on the status of Crimea. Russia voted against the resolution and China abstained. Ambassador Power’s remarks on the failed resolution, available at <http://usun.state.gov/briefing/statements/223543.htm>, are excerpted below.

* * * *

Good day everybody. Today’s vote is a reflection of what Russia denies and the whole world knows.

The whole world knows the government of Ukraine has acted with restraint in the face of repeated provocations. From the beginning, Ukraine’s leaders have sought dialogue and a peaceful solution. Unlike the former President, who fled the country, they have sought to fulfill the spirit of the February 21 agreement.

They have reached out to minorities inside the country and scheduled nationwide elections for May that will be closely monitored by legions of international observers. Those elections will give the people of Crimea and all of Ukraine the opportunity they deserve to choose their own leaders and, by so doing, shape the policies and priorities of a new government.

The whole world knows the legitimate leadership of Ukraine did not instigate this crisis, and neither did the citizens of Ukraine. The crisis came with a label—made in Moscow. It was Moscow that ordered its armed forces to seize control of key facilities in Crimea, to bully local officials, and to threaten the country’s eastern border. It was Moscow that tried to fool the world with a false narrative about extremism and the protection of human rights—about refugees fleeing, and about attacks on synagogues. The reality is that the part of Ukraine where minorities are threatened is Crimea, where Russian forces have confronted Ukrainians, and spread fear within the Tatar community—which has endured Russian purges and ethnic cleansing in the past and fears now that this bitter past will serve as prologue.

The whole world knows that the referendum scheduled for tomorrow in Crimea was hatched in the Kremlin and midwived by the Russian military. It is inconsistent with Ukraine’s constitution and international law. It is illegitimate and it will have no legal effect.

The world knows that the resolution offered today was offered in a spirit of reconciliation, in the desire for peace, in keeping with the rule of law, in recognition of the facts, and in fulfillment of the obligation of this Council to preserve stability and to promote peace among nations. Russia may have the ability to block this resolution’s passage, just as it has blocked Ukrainian ships, blocked the voices of journalists objecting to Moscow’s belligerence and blocked international observers. But as I said in my statement earlier, Russia cannot veto the truth.

President Obama and Secretary of State Kerry have said repeatedly that the United States will stand with the Ukrainian people as we continue to seek a principled and peaceful resolution to this crisis. That is our position—and as we saw in the Council today, we are not alone in that regard. Russia is.

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On March 15, 2014, Ambassador Power delivered the explanation of vote for the United States on the resolution on Ukraine which Russia vetoed that provided that the referendum on the status of Crimea “can have no validity, and cannot form the basis for any alteration of the status of Crimea” and called upon “all states, international organizations and specialized agencies not to recognize any alteration of the status of Crimea on the basis of this referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.” That explanation of vote follows and is available at <http://usun.state.gov/briefing/statements/223538.htm>.

* * * *

The United States deeply appreciates the support from our colleagues around this table and from the many states who have called for a peaceful end to the crisis in Ukraine.

This is, however, a sad and remarkable moment.

This is the seventh time that the UN Security Council has convened to discuss the urgent crisis in Ukraine. The Security Council is meeting on Ukraine because it is the job of this body to stand up for peace and to defend those in danger.

We have heard a lot each time the Security Council has met about the echoes and relevance of history. We have heard, for example, about the pleas of the brave democrats of Hungary in 1956 and about the dark chill that dashed the dreams of Czechs in 1968.

We still have the time and the collective power to ensure that the past doesn't become prologue. But history has lessons for those of us who are willing to listen. Unfortunately, not everyone was willing to listen today.

Under the UN Charter, the Russian Federation has the power to veto a Security Council resolution, but it does not have the power to veto the truth. As we know, the word “truth”, or “pravda” has a prominent place in the story of modern Russia. From the days of Lenin and Trotsky until the fall of the Berlin Wall, Pravda was the name of the house newspaper of the Soviet Communist regime. But throughout that period, one could search in vain to find pravda in Pravda. And today, one again searches in vain, to find truth in the Russian position on Crimea, on Ukraine, or on the proposed Security Council resolution considered and vetoed a few moments ago.

The truth is that this resolution should not have been controversial. It was grounded in principles that provide the foundation for international stability and law: Article 2 of the UN Charter; the prohibition on the use of force to acquire territory; and respect for the sovereignty, independence, unity, and territorial integrity of member states. These are principles that Russia

agrees with and defends vigorously all around the world—except, it seems, in circumstances that involve Russia.

The resolution broke no new legal or normative ground. It simply called on all parties to do what they had previously pledged, through internationally binding agreements, to do. It recalled specifically the 1975 Helsinki Final Act and the 1994 Budapest Memorandum, in which Russia and other signatories reaffirmed their commitments themselves to respect Ukraine’s territorial integrity and to refrain from aggressive military action toward that country.

The resolution called on the government of Ukraine to do what it has promised it will do: to protect the rights of all Ukrainians, including those belonging to minority groups.

Finally, the resolution noted that the planned Crimean referendum, scheduled for tomorrow, has no legal validity and will have no legal effect on the status of Crimea.

From the beginning of this crisis, the Russian position has been at odds not only with the law, but also with the facts. Russia claimed that the rights of people inside Ukraine were under attack, but that claim has validity only in the parts of Ukraine where it was Russia, and Russian military forces, that were exercising undue influence. Russia denied that it was intervening militarily, but Russian troops have helped to surround and occupy public buildings, shut down airports, obstruct transit points, and prevent the entry into Ukraine of international observers and human rights monitors. Russian leadership has disclaimed any intention of trying to annex the Crimea, then reversed itself and concocted a rationale for justifying just such an illegal act.

Russia claims that its intentions are peaceful, but Russian officials have shown little interest in UN, European and American efforts at diplomacy—including Secretary of State Kerry’s efforts yesterday in London. Russia has refused Ukraine’s outstretched hand while, as we speak, Russian armed forces are massing across Ukraine’s eastern border. Two days ago, in this very chamber, Ukraine’s prime minister appealed to Russia to embrace peace. Instead, Russia has rejected a resolution that had peace at its heart and law flowing through its veins.

The United States offered this resolution in a spirit of reconciliation, in the desire for peace, in keeping with the rule of law, in recognition of the facts, and in fulfillment of the obligation of this council to promote and preserve stability among nations. At the moment of decision, only one hand rose up to oppose those principles. Russia—isolated, alone, and wrong—blocked the Resolution’s passage, just as it has blocked Ukrainian ships and international observers. Russia put itself outside those international norms that we have painstakingly developed to serve as the bedrock foundation for peaceful relations between states.

The reason only one country voted “no” today, is that the world believes that international borders are more than mere suggestions. The world believes that people within those internationally recognized borders have the right to chart their own future, free from intimidation. And the world believes that the lawless pursuit of one’s ambitions, serves none of us.

Russia has used its veto as an accomplice to unlawful military incursion—the very veto given nearly seventy years ago to countries who had led an epic fight against aggression. But in so doing, Russia cannot change the fact that moving forward in blatant defiance of the international rules of the road will have consequences. Nor can it change Crimea’s status. Crimea is part of Ukraine today; it will be part of Ukraine tomorrow; it will be part of Ukraine next week; it will be part of Ukraine unless and until its status is changed in accordance with Ukrainian and international law.

Russia prevented adoption of a resolution today. But it cannot change the aspirations and destiny of the Ukrainian people. And it cannot deny the truth displayed today that there is overwhelming international opposition to its dangerous actions.

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As discussed in Chapter 19, Russia's actions in Ukraine constitute a failure to abide by commitments and obligations reaffirmed in the 1994 Budapest Memorandum, signed when Ukraine decided to remove all nuclear weapons from its territory. The March 25, 2014 U.S.-Ukraine Joint Statement (excerpted in Chapter 19 and available at www.whitehouse.gov/the-press-office/2014/03/25/joint-statement-united-states-and-ukraine) affirms the commitments by Ukraine and the United States under the Budapest Memorandum, and condemns Russia's purported annexation of Crimea.

Ambassador Power addressed the UN General Assembly at a meeting on Ukraine on March 27, 2014. Her remarks are excerpted below and available at <http://usun.state.gov/briefing/statements/224017.htm>.

* * * *

We meet today to express our collective judgment on the legality of the Russian Federation's military intervention in and occupation of Ukraine's Crimea region. The resolution before us is about one issue and one issue only. And that is affirming our commitment to the sovereignty, political independence, unity, and territorial integrity of Ukraine. Through it, we make clear our ongoing support for the fundamental idea that borders are not mere suggestions.

At the same time, this Resolution expresses the desire of the international community to see a peaceful outcome to the dispute between Ukraine and Russia and stresses the importance of maintaining an inclusive political dialogue that reflects every segment of Ukrainian society.

We have always said that Russia had legitimate interests in Ukraine; it has been disheartening in the extreme to see Russia carry on as if Ukrainians have no legitimate interests in Crimea, when Crimea is a part of Ukraine. Self-determination is a value that all of us here today hail. We do so while recognizing the critical, foundational importance of national and international law. Coercion cannot be the means by which a self determines. The chaos that would ensue is not a world that any of us can afford; it is a dangerous world. We echo the views expressed by all regions of the world these last weeks calling for a de-escalation of tensions and an electoral process in Ukraine that will allow the people of that country—in all of their diversity—to choose their leaders, freely, fairly, and without coercion.

Speaking at The Hague two days ago, President Obama said that “if the Ukrainian people are allowed to make their own decisions, their decision will likely be that they want to have a relationship with Europe and they want to have a relationship with Russia, and that this is not a zero sum game.”

Ukraine was wise to bring its concerns before this body. It is wise to seek our backing for the preservation of its rights, which are also all of our rights—to have our territory and independence respected. Ukraine is justified in seeking our votes in reaffirming and protecting its borders. It is justified in asking us not to recognize the new status quo that the Russian

Federation has tried to create with its military. Ukraine merits our commendations for the restraint it has shown and the positive steps it has taken to prevent a further escalation of the crisis. And Ukraine deserves our full support in trying to persuade Russia to end its isolation and to move from a policy of unilateral confrontation and aggressive acts to a good faith diplomatic effort informed by facts, facilitated by dialogue, and based on law.

We urge you to vote “yes” on a resolution that enshrines the centrality of territorial integrity and that calls for a diplomatic, not a military solution, to this crisis.

* * * *

On March 27, 2014, the UN General Assembly adopted resolution 68/262, on the “Territorial integrity of Ukraine,” which contains language similar to the Security Council resolution that Russia vetoed, declaring the invalidity of the March 16, 2014 referendum on the status of Crimea. Ambassador Power’s statement hailing the General Assembly resolution follows and is available at

<http://usun.state.gov/briefing/statements/224058.htm>.

* * * *

Today, countries from every corner of the world made clear their support for Ukraine’s territorial integrity and sovereignty, their support for international law, and for the foundational norms that underpin the United Nations and international cooperation in the 21st century. The world has made clear that the international community will not accept Russia’s illegal annexation of Crimea

The resolution adopted by the General Assembly is a clear call from the international community for all states to desist and refrain from actions that undermine Ukraine’s national unity and territorial integrity. The resolution also stresses the importance of maintaining an inclusive political dialogue in Ukraine that reflects the diversity of its society.

I welcome the support from member states in every region who have joined together in condemning an act that blatantly undermines the UN Charter. The vote shows the strong global conviction, grounded in international law, that nations and peoples have the right to chart their own course free from external influences or fear of invasion. Many of today’s votes were cast in recognition that while we may currently be discussing Ukraine, if such a blatant violation of a nation’s borders is left unchecked, the consequences for other nations could be severe.

It is important to note that, in the face of international isolation, only a handful of states joined with Russia in defending its violation of Ukrainian sovereignty and territorial integrity. Many of these votes came from regimes that, like Russia, fear free expression and peaceful assembly. Today’s vote shows that despite significant misinformation spread by Russia, the truth of what Russia has done in Crimea has penetrated to all the regions of the world.

The United States continues to encourage a resolution to this crisis through direct dialogue between Russia and Ukraine as supported by the international community; international monitors to ensure the rights of all Ukrainians are protected including vulnerable minorities in

occupied Crimea; a free and fair presidential election in May; and an inclusive constitutional reform process. The United States stands with the people of Ukraine and will continue to support them as they build a democratic, stable and prosperous future.

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On April 29, 2014, Ambassador Power addressed another Security Council meeting on Ukraine. Her remarks are excerpted below and available at <http://usun.state.gov/briefing/statements/225390.htm>.

* * * *

On April 17, Ukraine, the Russian Federation, the European Union and the United States issued the Geneva Joint Statement to deescalate the crisis that brings us together this evening. That statement outlined a series of concrete steps to end the violence, halt provocative actions, and protect the rights and security of all Ukrainian citizens. As Secretary Kerry said on April 17, “all of this, we are convinced, represents a good day’s work. The day’s work has produced principles, and it has produced commitments, and it has produced words on paper, and we are the first to understand and to agree that words on paper will only mean what the actions that are taken as a result of those words produce.”

Secretary Kerry also commended Foreign Minister Lavrov and the Ukrainian Foreign Minister for their cooperation in achieving this hard-negotiated agreement. It was a moment of hope. Since then, the Government of Ukraine has been implementing its commitments in good faith. Regrettably, the same cannot be said of the Russian Federation.

As we meet, observers from the OSCE Special Monitoring Mission are reporting that most of Ukraine—including eastern Ukraine—is peaceful. The exceptions are in such areas as Donetsk, Luhansk, and Slovyansk where pro-Russian separatists continue to occupy buildings and attack local officials. There, we have seen a sharp deterioration in law and order. Just today, pro-Russian separatists—armed with baseball bats—stormed the government buildings in Luhansk, seizing control of the center of municipal activity in one of the largest cities in eastern Ukraine. This kind of thuggery mimics the seizures of police stations, city halls, and other government buildings in cities and towns in Donetsk Oblast and surrounding areas.

In addition to occupying government buildings, over the past two weeks: Gunmen kidnapped a senior police officer in Luhansk. In Donetsk, pro-Russian thugs armed with baseball bats attacked peaceful participants at a pro-unity rally, seriously injuring at least 15. Also in Donetsk, pro-Russian groups continue to hold 17 buildings, including the regional television broadcasting center. In the city of Slovyansk, the mayor was kidnapped, as were several journalists. The separatists in that area now hold an estimated 40 hostages. Nearby, three bodies were recently pulled from a river; each showing unmistakable signs of physical abuse; one has been identified as a local politician, another as a 19 year-old pro-unity student activist. Yesterday, gunmen reportedly chased members of the Slovyansk Roma community from their homes.

Make no mistake, these are not peaceful protests. This is not an eastern Ukrainian spring. It is a well-orchestrated campaign—with external support—to destabilize the Ukrainian state.

Finally, as all the world knows, pro-Russian separatists in Donetsk have kidnapped and continue to hold seven international inspectors, openly declared as members of a Vienna Document mission, along with their Ukrainian escorts. My government joins with responsible governments everywhere in condemning this unlawful act and in being outraged by the shameful exhibition before the media of these international public servants. The Vienna Document, agreed upon by all 57 participating States of the OSCE, has been a lasting source of cooperation and military transparency. We call, with others, for the immediate and unconditional release of the inspectors and their Ukrainian escorts and the immediate end to their mistreatment while in captivity. We also call upon Russia, as a signatory to the Vienna Document, to help secure their release, and to confirm publicly—even if belatedly—for the record that the abducted monitors were part of a legitimate mission on behalf of the international community.

My colleagues, since April 17, the government of Ukraine has acted in good faith and with admirable restraint to fulfill its commitments. The Kyiv City Hall and its surrounding area are now clear of all Maidan barricades and protestors. Over the Easter holiday, Ukraine voluntarily suspended its counterterrorism initiative, choosing to de-escalate despite its fundamental right to provide security on its own territory and for its own people. Unlike the separatists, Ukraine has cooperated fully with the OSCE Special Monitoring Mission and allowed its observers to operate in regions about which Moscow had voiced concerns regarding the treatment of ethnic Russians.

In addition, Prime Minister Yatsenyuk has publicly committed his government to undertake far-reaching constitutional reforms that will strengthen the power of the regions. He has appealed personally to Russian-speaking Ukrainians, pledging to support special status for the Russian language and to protect those who use it. He announced legislation to grant amnesty to those who surrender arms.

All this should be cause for optimism and hope. Tragically, what we have seen from Russia since April 17 is exactly what we saw from Russia prior to April 17. More attempts to stir up trouble. More efforts to undermine the government of Ukraine. And statement after statement that are at odds with the facts. What we have not seen is a single positive step by Russia to fulfill its Geneva commitments. Instead, Russian officials have refused to publicly call on the separatists to give up their weapons and relinquish their illegal control of Ukrainian government buildings. In fact, Russia continues to fund, to coordinate, and to fuel the heavily-armed separatist movement. In addition, just outside of Ukraine's border, Russia has continued to engage in threatening troop movements that are designed not to calm tensions, but to embolden the separatists and to intimidate the government.

In closing, I emphasize that the United States remains committed to supporting the principles of the UN Charter and will continue to uphold the territorial integrity and sovereignty of Ukraine. We continue to seek stability within a peaceful, democratic, inclusive, and united Ukraine, especially in advance of the upcoming important elections. We remain committed to a diplomatic process. But Russia seems committed to destabilization and fantastical justifications for her actions. The truth about what is happening in Ukraine should guide our discussion – because truth is the only foundation on which an equitable and lasting solution to this crisis can be based.

* * * *

On May 10, The State Department issued a press statement on the illegal referenda in eastern Ukraine. The press statement, available at www.state.gov/r/pa/prs/ps/2014/05/225945.htm, is excerpted below.

* * * *

As the United States has said, the referenda being planned for May 11 in portions of eastern Ukraine by armed separatist groups are illegal under Ukrainian law and are an attempt to create further division and disorder. If these referenda go forward, they will violate international law and the territorial integrity of Ukraine. The United States will not recognize the results of these illegal referenda.

In addition, we are disappointed that the Russian government has not used its influence to forestall these referenda since President Putin's suggestion on May 7 that they be postponed, when he also claimed that Russian forces were pulling back from the Ukrainian border.

Unfortunately, we still see no Russian military movement away from the border, and today Kremlin-backed social media and news stations encouraged residents of eastern Ukraine to vote tomorrow, one even offering instructions for polling stations in Moscow. Russian state media also continue to strongly back the referenda with no mention of Putin's call for postponement.

The focus of the international community must now be on supporting the Ukrainian government's consistent efforts to hold a presidential election on May 25. International observers note that preparations for these elections are proceeding apace and in accordance with international standards, which will allow all Ukrainian people a voice in the future of their country. According to recent independent polls, a substantial majority of Ukrainians intend to vote on May 25. Any efforts to disrupt this democratic process will be seen clearly for what they are, attempts to deny the rights of Ukraine's citizens to express their political will freely.

As President Obama and Chancellor Merkel stated on May 2, the Russian leadership must know that if it continues to destabilize eastern Ukraine and disrupt this month's presidential election, we will move quickly to impose greater costs on Russia.

The Russian government can still choose to implement its Geneva commitments, as well as follow through on President Putin's statement of May 7. We call on them to do so.

* * * *

After the referenda in eastern Ukraine, Russian troop deployments increased along Ukraine's border and Russian support for pro-Russian separatists in eastern Ukraine continued. Despite a ceasefire agreement in September, attacks on Ukrainian forces in eastern Ukraine persisted. On September 25, 2014, the G-7 foreign ministers issued a further Joint Statement on Ukraine urging respect for the ceasefire agreement. The State Department media note publishing the joint statement is available at www.state.gov/r/pa/prs/ps/2014/09/232123.htm. The September 25, 2014 G-7 Joint Statement follows.

* * * *

We, the Foreign Ministers of Canada, France, Germany, Italy, Japan, the United Kingdom, the United States and the High Representative of the European Union, express our continued grave concern on the situation in eastern Ukraine.

We welcome the Minsk agreements of 5 and 19 September as an important step towards a sustainable, mutually agreed cease-fire, a secure Russian-Ukrainian border and the return of peace and stability to eastern Ukraine with the establishment of a “special status” zone, which is to be empowered with a strong local self-government under Ukrainian law. We condemn the ongoing violations of the ceasefire agreement.

The ceasefire agreement offers an important opportunity to find a durable political solution to the conflict, in full respect of Ukraine’s sovereignty and territorial integrity. Russia must immediately meet its own commitments of the Minsk agreement, including by withdrawing all of its forces, weapons and equipment from Ukraine; securing and respecting the international border between the two countries with OSCE monitoring; and ensuring that all hostages are released. Russia must also ensure that all commitments of the Minsk agreement be met and the political process within Ukraine continues. We commend the efforts Ukraine has made to implement its responsibilities under the Minsk agreement, such as passing legislation on amnesty and a “special status” for parts of eastern Ukraine.

We commend the OSCE’s key role through the Special Monitoring Mission (SMM) and within the Trilateral Contact Group in helping de-escalate the crisis. The OSCE has been assigned a crucial role as the monitoring mechanism in the implementation of the Minsk agreement, which we fully support. We call on all OSCE states to help provide the organization all support necessary to fulfill these responsibilities, and to support an expansion of the SMM. We urge the Governments of Russia and Ukraine to fully facilitate and support this expansion.

We reiterate our condemnation of Russia’s illegal attempted annexation of Crimea.

We reiterate our condemnation of the downing of the Malaysia Airlines aircraft on 17 July 2014 with the loss of 298 innocent lives and welcome the internationally respected recent publication of the preliminary report on the tragedy. We call for immediate, safe and unrestricted access to the crash site to enable independent experts to swiftly conclude their investigations, also in order to hold accountable those responsible for the event.

On the threshold of the coming winter, Ukraine faces difficult economic and social challenges, partially caused by the conflict forced upon the country. We commit ourselves to help Ukraine to recover from this massive economic setback and to rebuild its economy. To this end we will closely work together and coordinate with other donors and international financial institutions. We welcome the upcoming donors’ and investors’ conferences organized by Ukraine with the support of the European Union. We encourage the Ukrainian leadership to continue with necessary political, economic and rule of law-related reforms. We trust that the early parliamentary elections will be free, fair and fully in line with international standards.

We stand united in the expectation that this crisis will be solved with respect for international law, and Ukraine’s sovereignty, territorial integrity and independence. In the course of the past weeks, we have put in place additional coordinated sanctions affecting Russia. Sanctions are not an end in themselves; they can only be rolled back when Russia meets its commitments related to the cease fire and the Minsk agreements and respects Ukraine’s

sovereignty. In case of adverse action, however, we remain ready to further intensify the costs on Russia for non-compliance.

We welcome the ratification of the Association Agreement and Deep and Comprehensive Free Trade Area (DCFTA) by the European Parliament and the Verkhovna Rada on 16 September. In accordance with the agreement reached at the trilateral meeting between the EU, Ukraine and Russia on 12 September on the implementation of the DCFTA, the EU intends to postpone the provisional application of the trade-related provisions until 31 December 2015, while maintaining the EU's autonomous trade measures to the benefit of Ukraine, as agreed upon at the trilateral meeting between the EU, Ukraine and Russia on 12 September. This will help stabilize the Ukrainian economy in this difficult time. We welcome that the trilateral talks between Ukraine, Russia and the EU will continue. It is equally important to continue the discussions between Russia, Ukraine and the EU on resolving outstanding energy issues

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2. Central African Republic

On January 21, 2014, the United States welcomed the selection of Catherine Samba-Panza as Transitional President in the Central African Republic ("C.A.R."). Secretary Kerry's press statement is available at www.state.gov/secretary/remarks/2014/01/220501.htm and includes the following:

As C.A.R.'s first woman head of state since the country's independence, and with her special background in human rights work and mediation, she has a unique opportunity to advance the political transition process, bring all the parties together to end the violence, and move her country toward elections not later than February 2015.

We also commend the Transitional National Council for conducting the selection process for the new C.A.R. Transitional President in a deliberate, open, and transparent manner that ensured the airing of a full range of views from C.A.R.'s civil society.

The United States has been deeply engaged in the work to help pull C.A.R. back from the brink, including the pivotal visits of Ambassador Power and Assistant Secretary Thomas-Greenfield less than a month ago. The United States, along with regional leaders of the Economic Community of Central African States (ECCAS), the African Union, and other members of the international community, hopes to support President Samba-Panza and call on the people of C.A.R. to work constructively with her, participate in the political process, and avoid any resurgence in violence.

3. European Integration

a. Albania

On June 27, 2014, the State Department issued a press statement, available at www.state.gov/r/pa/prs/ps/2014/06/228545.htm, congratulating Albania on the decision by the European Council to grant European Union candidate country status to Albania. The press statement includes the following:

We salute the dedicated, hard work present and previous governments have invested to reach this important milestone. Albania's political parties, whether in government or in opposition, will need to continue to work together to advance their country on the path to European Union membership.

The United States and Albania are close friends and enduring allies. We remain committed to offering our full support as the Albanian people pursue their chosen path towards a prosperous European future.

b. Georgia, Moldova, and Ukraine

The State Department issued another press statement on June 27, 2014, congratulating Georgia, Moldova, and Ukraine on the signing of association agreements and establishing free trade areas with the European Union. The press statement, available at www.state.gov/secretary/remarks/2014/06/228518.htm, includes the following:

The agreements signed today mark a major step toward integrating these Eastern Partnership countries more closely with the European Union and realizing a Europe whole, free, and at peace.

It is not just that these agreements link the EU's eastern neighbors into its single market and unlock new opportunities for trade and assistance. Today, Moldova, Georgia, and Ukraine have signaled their readiness to undertake important economic and legal reforms that will make them stronger, more vibrant democracies.

We continue to support the territorial integrity of Georgia, Moldova, and Ukraine. The decision on the best path to security, prosperity, and a better future for their citizens is one that can and should be made by these sovereign nations, and by them alone. We applaud the hard work and determination that has brought them to this point, and we will continue to stand with them as they work to implement key reforms and build more prosperous, stable, and democratic societies.

The State Department issued another press statement on September 16, 2014, available at www.state.gov/r/pa/prs/ps/2014/09/231699.htm, to congratulate Ukraine after the Ukrainian and European parliaments simultaneously ratified Ukraine's Association Agreement with the European Union.

4. Georgia

On December 18, 2014, the United States Department of State hosted the annual meeting of the U.S.-Georgia Strategic Partnership Commission's Working Group on People-to-People and Cultural Exchanges. The State Department media note released in conjunction with the meeting reiterates U.S. support for Georgia's sovereignty and territorial integrity. The media note, available at www.state.gov/r/pa/prs/ps/2014/12/235418.htm, includes the following:

The United States ... reaffirmed that it will not recognize the legitimacy of any so-called "treaty" between Georgia's Abkhazia region and the Russian Federation. Furthermore, the United States expressed concern about the ongoing "borderization" activities along the Administrative Boundary Lines of Georgia's occupied territories, which are inconsistent with Russia's international commitments. In this context, the Working Group renewed its full support for the Geneva International Discussions as a key tool to achieve concrete progress on security and humanitarian issues in the occupied territories. The Working Group emphasized the importance of engagement with the inhabitants of the occupied regions of Abkhazia and South Ossetia through civil integration and other reconciliation initiatives, and encouraged the continuation of such efforts. The Working Group also discussed the importance of promoting tolerance and inclusiveness for religious and ethnic minorities, and the United States expressed support for ongoing and future programs advancing these important goals. The Government of Georgia welcomed U.S. efforts to further bolster people-to-people engagement on the ground.

5. Bosnia and Herzegovina

On November 11, 2014, the United States participated in a Security Council session on Bosnia and Herzegovina. Remarks by Ambassador David Pressman, Alternate Representative to the United Nations for Special Political Affairs, at the Security Council session are available at <http://usun.state.gov/briefing/statements/233950.htm> and excerpted below. Ambassador Pressman expressed ongoing U.S. support for the mandate of the High Representative under the General Framework for Peace as well as Resolution 2183 adopted by the Security Council on November 11, 2014.

* * * *

This Chapter VII mandate renewal reaffirms the Council's willingness to support the people of Bosnia and Herzegovina in their efforts to sustain a safe and secure environment with the assistance of the EUFOR mission and NATO Headquarters Sarajevo, and to implement the

civilian aspects of the General Framework Agreement for Peace with the help of the Office of the High Representative.

Bosnia and Herzegovina has expressed, without reservation, its strong support for this mandate renewal and for all of the language therein. The United States joins Bosnia and Herzegovina and the members of this Council and the EU Foreign Affairs Council in our continued support for the EUFOR mandate. And we are disappointed that one delegation did not join consensus in responding to Bosnia and Herzegovina's own request for continued Security Council support.

* * * *

...[T]he United States commends Bosnia and Herzegovina on holding general elections this October. The elections were orderly and conducted in a competitive environment, although we also cannot ignore that there were several irregularities, as noted by the OSCE observation mission.

As finalized results are expected today, it is our hope that governments will form as quickly as possible and that the elected representatives of the people will look for ways to move the country forward positively and to compromise, where needed.

Further, we call on the political parties and institutions to meet their obligations to implement the ruling of the BiH Constitutional Court on the electoral system for Mostar.

Madame President, we support Bosnia and Herzegovina's long-expressed goal of Euro-Atlantic integration and continue to believe that the integration process is the surest and most expeditious path to the country's long-term stability and prosperity. We note Bosnia and Herzegovina recently reiterated this goal during the recent General Debate, in which Serb Member of the Presidency of Bosnia and Herzegovina Radmanovic stated unequivocally that his country's ultimate goal was, "full, legal integration into the European Union."

Euro-Atlantic integration will not happen without continued efforts by a variety of stakeholders. We welcome the reform initiative proposed by the British and German Foreign Ministers last week to get the country back on track for EU membership, and we will work with our European partners to support the adoption and implementation of this reform agenda. We also will work with Bosnia and Herzegovina's newly elected leaders to press for the resolution of the listing of defense properties in order to activate its NATO Membership Action Plan. We hope the new government seriously engages on the reform agenda to build a more effective, democratic and prosperous state, and to progress towards the country's goals of EU and NATO integration.

As the High Representative noted in his report, authorities have again failed to make any concrete progress on the outstanding 5+2 objectives and the conditions for the closure of the Office of the High Representative. We also share his concern over the Republika Srpska's lack of compliance with its obligation to provide the High Representative with timely access to officials, institutions and documents, and we urge the relevant authorities to comply.

The United States strongly supports the territorial integrity and sovereignty of Bosnia and Herzegovina as guaranteed by the Dayton Peace Accords. We note that some political leaders persist in their attempts to use divisive rhetoric to distract the public from economic and political stagnation.

The recent elections proved that an increasing majority of citizens are tired of these distractions and seek true leadership from their officials. We condemn divisive rhetoric, and

during the coalition formation period, we urge parties to seek partners that are prepared to work toward a future for all of Bosnia and Herzegovina.

Finally, I want to again reiterate the support of the United States for the renewal of the EUFOR mandate under the Chapter VII of the UN Charter. The United States commends the work of NATO Headquarters Sarajevo and EUFOR mission in Bosnia and Herzegovina and we believe EUFOR and NATO Headquarters Sarajevo—successors to SFOR—are essential in sustaining a safe and secure environment in Bosnia and Herzegovina, providing vital capacity-building to the government, and offering reassurance across ethnic lines that the international community is committed to the country’s stability.

We remain hopeful for the future of Bosnia and Herzegovina and we will continue to work with the international community and with the country’s institutions to encourage progress in each of these areas and to improve the lives of its citizens.

* * * *

C. EXECUTIVE BRANCH AUTHORITY OVER FOREIGN STATE RECOGNITION

On April 21, 2014, the Supreme Court granted certiorari for a second time in *Zivotofsky v. Secretary of State*, No. 13-628. The Supreme Court had previously remanded the case to the court of appeals in 2012 for a determination of the constitutionality of a law (Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350) requiring the Department of State to record “Israel” as the place of birth for a U.S. citizen born in Jerusalem upon request of that citizen. The court of appeals had found the question nonjusticiable when it first considered the appeal. On remand, the court of appeals struck down the provision as unconstitutional on the merits, reasoning that it infringes on the exclusive authority of the executive branch to determine which states, governments, and territorial boundaries the United States recognizes. The United States filed its brief in the Supreme Court in support of affirming the court of appeals on September 22, 2014. The Supreme Court heard oral argument in the case on November 3, 2014. For prior developments in the case, see *Digest 2006* at 530-47, *Digest 2007* at 437-43, *Digest 2008* at 447-54, *Digest 2009* at 303-10, *Digest 2011* at 278-82, *Digest 2012* at 283-86, and *Digest 2013* at 259-69. Excerpts follow from the brief of the United States filed in the U.S. Supreme Court in 2014 (with footnotes omitted).^{**}

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^{**} Editor’s note: On June 8, 2015 the Supreme Court decided the case, holding that the President has exclusive recognition power and that the law infringes on that power.

I. THE CONSTITUTION GRANTS THE PRESIDENT EXCLUSIVE POWER TO RECOGNIZE FOREIGN STATES AND THEIR TERRITORIAL BOUNDARIES

A. The Constitution Assigns Exclusively To The Executive The Authority To Recognize Foreign States And Governments, Including Their Territorial Boundaries

The decision to recognize a foreign state or its government is an official conclusion by the United States that the entity in question meets the requirements of a state or government, and should be treated as such in this Nation's foreign relations. Recognizing a government entails recognizing the existence of the state ruled by that government, which in turn entails determining the territorial boundaries (*i.e.*, the extent of the state's sovereignty) that will be recognized. Because the establishment of diplomatic relations and negotiation of treaties with states are predicated on recognition of the state and government in question, recognition decisions establish the foundation for the conduct of the Nation's foreign affairs.

The text and structure of the Constitution's foreign-affairs provisions establish that the President has sole recognition authority. By contrast, the Constitution's text prescribes no role for the Congress in recognition decisions, and that body lacks the institutional capability to make the timely, informed and nuanced judgments required to exercise the recognition power in a manner that advances the Nation's foreign-relations interests. And because the Constitution provides no mechanism by which the Legislative and Executive Branches could share the recognition power, exclusive commitment of the recognition power to the Executive is necessary to ensure that the Nation speaks with one voice in foreign affairs.

1. *Article II of the Constitution assigns the recognition power to the President*

a. *The Reception Clause confers recognition power on the President*

The primary source of the President's recognition power is Article II's grant of authority to the President alone to "receive Ambassadors and other public Ministers." U.S. Const. Art. II, § 3. That authority necessarily includes the power to decide which ambassadors the President will receive, and therefore the power to decide whether to establish diplomatic relations with a foreign entity. Because establishing diplomatic relations with a foreign entity entails determining that the entity should be treated as a state, the recognition power is vested solely in the President. See 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1560, at 415-416 (1833) (*Story*).

* * * *

b. *The President's other foreign-affairs powers reinforce his recognition power*

The President's recognition power is further grounded in the Constitution's assignment of the bulk of foreign-affairs powers to the President. Article II provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. Art. II, § 1, Cl. 1. "[T]he historical gloss on the 'executive Power' * * * has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)).

* * * *

The Constitution thus establishes the Executive as “the sole organ of the federal government in the field of international relations,” with exclusive authority to conduct diplomatic relations. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-320 (1936). Recognition—the decision whether to treat an entity as a state or government in the Nation’s foreign relations—falls within the core of the President’s sole authority over “[t]he transaction of business with foreign nations.” 16 *Jefferson Papers* 379.

... Particularly relevant to recognition, the Constitution assigns to the President the power to nominate ambassadors, U.S. Const. Art. II, § 2, Cl. 2, and to “make Treaties,” *ibid.*

The Constitution gives the President alone the power to nominate an ambassador. U.S. Const. Art. II, § 2, Cl. 2. The nomination decision encompasses the antecedent questions whether to recognize the foreign state and government, and whether to establish diplomatic relations. In nominating the ambassador, the President implements his recognition decision. While the Senate must consent to appointment of the President’s nominee, that determination concerns whether or not the President’s nominee is suitable for confirmation, and does not extend to the recognition decision already made by the President. See 16 *Jefferson Papers* 378, 379-380 (Senate’s confirmation power does not include the power to “judge* * * the necessity which calls for a mission to any particular place”). Even if the Senate withholds consent to a nominee, moreover, the President may effectuate a recognition decision by engaging in diplomatic relations through officials who do not require confirmation. And the President retains the authority not to appoint an ambassador even after the Senate has given its advice and consent. Nor does the Constitution contemplate any participation by Congress in the Presidential decision to initiate diplomatic relations; Article II’s requirement that Congress establish offices by law (§ 2, Cl. 2) does not apply to ambassadors and other public ministers. And no other constitutional power would authorize Congress to establish diplomatic relations with a foreign entity.

Similarly, the President has the power to “make Treaties” with the advice and consent of the Senate. U.S. Const. Art. II, § 2, Cl. 2. The President has the sole responsibility for negotiating treaties before presenting them to the Senate. See *Curtiss-Wright*, 299 U.S. at 319 (“Into the field of [treaty] negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.”). Once the President has completed negotiations, the Senate has the constitutional prerogative to decide whether to consent to ratification. The President, however, retains the ultimate authority to decide whether to ratify and conclude a treaty after the Senate provides its consent. See Restatement (Third) of Foreign Relations Law § 303 cmt. d, at 160 (1987) (Restatement). The President thus has exclusive power to ensure that the United States negotiates and concludes treaties in a manner that fully accords with his recognition policy.

c. The Founding generation understood the Executive’s recognition power to include the exclusive authority to decide whether recognition is appropriate

i. Consistent with the contemporaneous understanding and practice at the time of the Founding, the Washington Administration understood the decision whether to recognize a foreign state or government to require an assessment of whether recognition was appropriate under the circumstances. But cf. Pet. Br. 28. Hamilton thus explained that the Reception Clause “includes th[e power] of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognised, or not.” *Pacificus No. 1*, at 12.

* * * *

ii. President Washington’s Cabinet also understood the Executive’s authority to make recognition decisions to be exclusive of Congress. In 1793, Washington and the Cabinet unanimously decided that the President could receive the French ambassador, thereby recognizing the new government of France, without first consulting Congress. Letter from Washington to the Cabinet (Apr. 18, 1793), in 25 Jefferson Papers 568-569. ...

* * * *

2. Structural and functional considerations confirm that the President’s recognition power is exclusive

a. While the Constitution expressly confers recognition authority on the President through the power to receive ambassadors and other foreign-relations powers, the Constitution contains no provision for Congress to make, or even participate in, recognition decisions. See Story § 1560, at 417 (“The constitution has expressly invested the executive with power to receive ambassadors, and other ministers. It has not expressly invested congress with the power, either to repudiate, or acknowledge them.”). Nor do any of Congress’s enumerated powers encompass the recognition power.

The Constitution commits the recognition power to the Executive alone for the same reason it vests most foreign-affairs powers in the Executive. Congress proved institutionally incapable of conducting foreign relations under the Articles of Confederation, and the Framers understood that the Executive’s “unity[,] * * * [d]ecision, activity, secrecy, and dispatch” would enable it to react to international events with the necessary alacrity and clarity of purpose. The Federalist No. 70, at 472 (Hamilton); see Story § 1561, at 418 (Branches’ relative institutional capabilities “[p]robably” explain Constitution’s conferral of recognition power on the Executive without Senate participation); House Members Amicus Br. 17 (functional considerations justify exclusive Executive recognition power).

b. The decision whether to recognize a foreign state or government requires careful judgments about whether the state or government exists and controls particular territory, as well as judgments about whether recognition (or withholding recognition) will serve the United States’ foreign-relations interests. The Executive is far better positioned than the Congress to gather and assess the information needed to make those judgments in a timely and decisive manner, as the President “has his confidential sources of information,” and “his agents in the form of diplomatic, consular and other officials.” *Curtiss-Wright*, 299 U.S. at 320. With its “vast share of responsibility” for conducting foreign relations, only the Executive has the comprehensive understanding of the United States’ contemporaneous foreign-relations objectives that is necessary to decide whether—and when—recognition will advance the United States’ interest. *Garamendi*, 539 U.S. at 414 (citation omitted).

In addition, the timing of recognition decisions is often critical to steering international events in a direction that advances the Nation’s interests. For instance, President Truman recognized Israel minutes after it proclaimed independence, acting quickly to ensure that Israel would have immediate foreign support and that U.S. recognition would precede Soviet recognition. Michael J. Cohen, *Truman and Israel* 211, 215, 219 (1990). Indeed, the Executive makes numerous and often nuanced decisions related to recognition, including territorial determinations, in response to evolving events and claims of sovereignty—and each decision entails a careful assessment of the national-security and foreign-relations implications of the decision. ... Congress, which can take legally effective action only by passing a law, through

bicameral action and presentment to the President, see *INS v. Chadha*, 462 U.S. 919, 955-958 (1983), would be unable to exercise the recognition power with the necessary flexibility and dispatch.

Finally, secrecy can be crucial in determining whether to recognize a state or government, as such decisions often are made against the backdrop of conflict or annexation. Public disclosure of deliberations about recognition could exacerbate international tensions and create confusion regarding the United States' position. While the Executive is well-positioned to keep its deliberations secret, Congress is not. See *Curtiss-Wright*, 299 U.S. at 322.

c. Because recognition is a determination that the United States will treat an entity as a state or government in its foreign relations, it is crucial that the Nation speak with one voice. Cf. *Curtiss-Wright*, 299 U.S. at 319-320. That unity would be impossible, however, if the recognition power were shared between Congress and the Executive, as petitioner contends.

When the Executive and Congress share power over a single foreign-affairs decision—*i.e.*, whether to commit the United States to a treaty—the Constitution expressly delineates the Branches' respective roles. See *Curtiss-Wright*, 299 U.S. at 319 (treaty power preserves Executive's role as sole organ of foreign relations). But the Constitution contains no such apportionment of responsibility for recognition decisions. Treating the recognition power as shared could therefore set the two Branches at cross-purposes, undermining the Nation's ability to make and implement recognition decisions with the necessary speed and clarity.

Under petitioner's position, which in fact appears to be one of congressional supremacy, Congress would have the authority to reverse any Executive recognition decision—whether it reflected (as here) more than six decades of consistent policy, or a recent judgment in response to a rapidly evolving situation—by passing a law. The prospect of friction between the Branches during Congress's deliberations would create international uncertainty about the United States' position. If Congress passed such a bill, the President might veto it, and the Nation's recognition policy would then hinge on whether Congress overrides the veto. In the event of an override, the President would be bound to follow the recognition policy prescribed by Congress. That recognition decision, embodied in a statute, could not be easily altered or reversed, even if subsequent events rendered the decision detrimental to United States' foreign-relations interests. And any repeal—assuming Congress acted at all—might take weeks or months.

Under such a regime, the United States' apparent recognition position could flip back and forth, preventing the Nation from responding to international events with clarity and decisiveness, and leaving foreign sovereigns to guess at where the United States stands...

Even congressional action short of outright reversal of the President's recognition decisions could undermine the Nation's ability to convey and implement a coherent recognition policy. Here, for instance, petitioner contends (Br. 64-65) that Section 214(d) does not require the Executive to reverse the Nation's position on Jerusalem's status. But Section 214(d) would indisputably put the Executive in the position of attempting to maintain the Nation's longstanding position of not recognizing any claim of sovereignty over Jerusalem, while at the same time implementing a policy that requires it to present diplomatic documents on behalf of the United States that contradict that position. The result would be not merely to prevent the Nation from speaking with one voice, but to prevent the *Executive itself* from doing so in its conduct of foreign relations.

B. Historical Practice Confirms That The Executive Branch Has Sole Authority Regarding Recognition

More than two hundred years of historical practice confirms what the Constitution's text and structure make clear: The recognition power belongs exclusively to the Executive. ...

From the Washington Administration to the present, Presidents have asserted the sole authority to recognize a foreign state, its government, and the territorial scope of its sovereignty—and have unilaterally made hundreds of recognition decisions. Petitioner is unable to identify a single instance in our history in which Congress has asserted primacy in matters of recognition—either by rejecting a President's recognition decision or by making a decision the President was unwilling to make unilaterally. On a few occasions in the nineteenth century, Members of Congress sought to have Congress effect recognition on its own. But those efforts invariably foundered after the Executive and other Members of Congress insisted that the President had sole recognition authority. In addition, in a handful of instances on which petitioner relies (Br. 57), the President for political reasons chose to seek congressional support before effecting recognition—but in each case, the President determined recognition policy, and Congress acted consistently with his views.

1. The Executive has consistently asserted sole authority over recognition, including recognition of territorial boundaries

a. In 1793, without consulting Congress, President Washington recognized the new government of France by officially receiving Genet. ... Since then, the Executive has routinely made hundreds of unilateral recognition decisions. See, e.g., 1 John Bassett Moore, *A Digest of International Law* §§ 27-58, at 72-163 (1906) (*Moore*) (eighteenth- and nineteenth-century decisions); 1 Green Haywood Hackworth, *Digest of International Law* §§ 35-51, at 195-318 (1940) (twentieth-century decisions); 2 Marjorie M. Whiteman, *Digest of International Law* §§ 6-64, at 133-467 (1963) (twentieth-century decisions). ...

The Executive's exercise of unilateral authority continues today. For instance, in March 2014, the White House released a joint statement with Ukraine, stating that the United States "will not recognize Russia's illegal attempt to annex Crimea." Joint Statement by the United States and Ukraine, <http://www.whitehouse.gov/the-press-office/2014/03/25/joint-statement-united-states-and-ukraine>. Other examples include the 2013 recognition of the Government of Somalia and the 2011 recognition of the state of South Sudan. U.S. Dep't of State, Hillary Rodham Clinton, Sec'y of State, *Remarks with President of Somalia Hassan Sheikh Mohamud After Their Meeting* (Jan. 17, 2013), <http://www.state.gov/secretary/20092013clinton/rm/2013/01/202998.htm>; Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues, *2011 Digest* § 9, at 271, 274.

b. The President's exclusive recognition power has always been understood to include the authority to determine the territorial boundaries of a foreign state. Such judgments are integral to recognition, as one of the criteria of statehood under customary international law is that a state must have "defined territory" (which may be disputed or unsettled in part). Restatement § 201 & cmt. b, at 72-73. Recognition of a state therefore requires the United States to determine its position on the claimed territorial extent of the state's sovereignty (including when the United States' position is that the claim is disputed). See *id.* §§ 202, 203 n.2, at 77, 84; Pet. App. 56a.

The Executive makes decisions about what international boundaries to recognize through an interagency process that is led by the State Department and includes the Department of Defense. Such determinations often have national-security implications. For instance, the Executive must determine the extent to which it recognizes a state's territorial claims to preserve

the freedom of movement of the U.S. Armed Forces through air and sea. See U.S. Navy Judge Advocate General's Corps, *Maritime Claims Reference Manual* (2013), http://www.jag.navy.mil/organization/code_10_mcrm.htm; Under Sec'y of Def. for Policy, Dep't of Def., *Freedom of Navigation Reports*, <http://policy.defense.gov/OUSDP/Offices/FON.aspx> (last visited Sept. 18, 2014). Territorial recognition decisions also may have substantial consequences for U.S. relations with the states involved. The President's refusal to recognize Russia's annexation of Crimea is the most recent example of such a determination.

* * * *

2. Congress has acquiesced in the President's sole recognition power

Members of Congress have occasionally proposed bills that would have asserted a congressional role in recognizing foreign states or governments. But the Executive Branch—and some Members of Congress—opposed those efforts, and they ultimately came to nothing.

* * * *

3. Petitioner's attempt to demonstrate that Congress has exercised recognition power is unavailing

Petitioner cites (Br. 37-41, 45-52) four instances in which, he contends, Congress exercised the recognition power. Contrary to petitioner's arguments, on each occasion Congress's actions were consistent with recognition determinations made by the President.

a. In the early nineteenth century, Congress passed trade statutes that were consistent with the Executive's already-stated position on sovereignty over Haiti. In 1800, Congress passed a statute suspending "commercial intercourse between the United States and France, and the dependencies thereof," and providing that the "island of Hispaniola shall for purposes of this act be considered as a dependency of the French Republic." Act of Feb. 27, 1800, ch. 10, §§ 1, 7, 2 Stat. 7, 10. That statement tracked President Adams' 1799 proclamation declaring that "St. Domingo"—a name for the whole island that the Executive used interchangeably with "Hispaniola"—should be treated as a French dominion for purposes of an earlier non-intercourse law. A Proclamation (June 26, 1799), in 1 *Messages and Papers* 288-289 (1896). In the Executive's view, France had by treaty gained sovereignty over "the whole of the Island of St. Domingo." Letter from Monroe to Madison (June 3 [ca. July 23], 1795), in 16 *Madison Papers* 38 (1898).

Similarly, an 1806 statute prohibiting trade between the United States and "any part of the island of St. Domingo, not in possession, and under the acknowledged government of France," was consistent with the Executive's position that France retained sovereignty even though Haiti had declared independence and driven the French from portions of the island.

Act of Feb. 28, 1806, ch. 9, § 1, 2 Stat. 351; see Letter from Madison to Livingston (Jan. 31, 1804), in 6 *Madison Papers* 410-411 (2002).

b. Congress also acted consistently with the President's stated views in connection with President Jackson's 1837 recognition of Texas's independence from Mexico. Contra Pet. Br. 45-49. In 1836, Jackson informed Congress that on "the ground of expediency," he believed Congress should decide when recognition would be appropriate, and that his own view was that recognition should be "suspended" pending a threatened invasion by Mexico. Message (Dec. 21,

1836), in *3 Messages and Papers* 265-271. He reserved the question of the Executive's exclusive authority. *Ibid.* After the invasion failed, Cong. Globe, 24th Cong., 2d Sess. 33 (1837), Congress appropriated funds for a minister "whenever the President * * * shall deem it expedient." Act of Mar. 3, 1837, ch. 33, 5 Stat. 170. Jackson then appointed a minister. Message (Mar. 3, 1837), in *3 Messages and Papers* 281-282. Congress thus implemented the recognition policy the President established.

c. In 1862, Congress facilitated President Lincoln's decision to recognize Haiti and Liberia. Contra Pet. Br. 50-52. In light of the political sensitivity of recognizing Haiti and Liberia during the Civil War, Lincoln decided that it would be prudent to enlist congressional support for his recognition decision. Rayford W. Logan, *The Diplomatic Relations of the United States With Haiti 1776-1891*, at 299 (1941). Lincoln informed Congress that he believed the countries should be recognized but was unwilling to inaugurate a "novel policy" in that respect without congressional agreement, and he requested an appropriation for ministers to the "new States." First Annual Message (Dec. 3, 1861), in *6 Messages and Papers* 47 (1897). After debates in which the bill's sponsor observed that congressional action was unnecessary to permit the President to recognize the republics, Cong. Globe, 37th Cong., 2d Sess. 1773 (1862) (Sen. Sumner), Congress authorized the appointment of diplomatic representatives to Liberia and Haiti. Act of June 5, 1862, ch. 96, 12 Stat. 421.

d. Finally, the Executive did not, as petitioner asserts (Br. 49-50), acknowledge congressional recognition authority in considering whether to recognize Hungary in 1849. During the Hungarian independence movement, the President gave a diplomatic agent the power to recognize Hungary's independence by negotiating a treaty with the new government. Power to Mr. Mann to Negotiate with Hungary (June 18, 1849), in *38 British and Foreign State Papers 1849-1850*, at 264 (1862). In that context, the Secretary of State's statement that the President would also "recommend" recognition "to Congress," *id.* at 263-264, is best read to suggest that the President would seek congressional support for the recognition decision he had already made. After the revolution failed, the President informed Congress that he would have recognized Hungary had he deemed it warranted "according to the usages and settled principles of this Government." S. Doc. No. 279, 61st Cong., 2d Sess. 2 (1910).

C. This Court And Individual Justices Have Repeatedly Stated That The Constitution Assigns Recognition Authority To The President Alone

1. This Court and individual Justices have many times stated that the Executive has sole authority to make recognition decisions. In 1817, Chief Justice Marshall, sitting as Circuit Justice, held that "as our executive had never recognized the independence of Buenos Ayres, it was not competent to the court to pronounce its independence." *United States v. Hutchings*, 26 F. Cas. 440, 442 (C.C.D. Va. 1817) (No. 15,429). In 1838, Justice Story concluded that "[i]t is very clear, that it belongs exclusively to the executive department of our government to recognise, from time to time, any new governments."⁸ *Williams*, 29 F. Cas. at 1404. Later decisions have reaffirmed the point. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964); *Baker*, 369 U.S. at 212; *National City Bank v. Republic of China*, 348 U.S. 356, 358 (1955); *United States v. Pink*, 315 U.S. 203, 229 (1942); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137-138 (1938); *United States v. Belmont*, 301 U.S. 324, 330 (1937).

Although these decisions held that the President had "sole" authority to recognize a foreign government, *Belmont*, 301 U.S. at 330, and that such action is "conclusive" on the courts, *Guaranty Trust*, 304 U.S. at 138, they did not specifically address a congressional attempt to constrain the President's recognition power. In light of Congress's historical acquiescence in the

Executive's exclusive exercise of that power, however, it is unsurprising that the Court had no occasion to address a dispute between the Branches. At the same time, it is significant that the Court never suggested a role for Congress in recognizing foreign states or governments.

2. Petitioner contends (Br. 59-60) that “[d]icta in opinions of this Court” assign the recognition power jointly to the President and to Congress. But the decisions on which petitioner relies did not involve the power to recognize foreign states or governments. Those decisions dealt with the status of territories controlled or acquired by the United States, a matter over which Congress has authority under the Territories Clause of the Constitution. See U.S. Const. Art. IV, § 3, Cl. 2; *Henkin* 72; *Jones v. United States*, 137 U.S. 202, 212, 216-217 (1890) (“legislative and executive departments” determined whether islands were “in the possession of the United States”); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 378, 380-381 (1948); *Boumediene v. Bush*, 553 U.S. 723, 753 (2008) (U.S. sovereignty at Guantanamo Bay).

Finally, petitioner also relies (Br. 30-31) on *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), but that decision is inapposite. There, Chief Justice Marshall—who had concluded in *Hutchings* that recognition decisions were made by the Executive, 26 F. Cas. at 442—stated that in applying the piracy statute to actions that would be acts of war (rather than crimes) if committed by agents of a government fighting for independence, the courts “must view such newly constituted government as it is viewed by the legislative and executive departments of the government.” 16 U.S. (3 Wheat.) at 643. Because criminal offenses must be defined by statute, *id.* at 634-635, the Court's point was that distinguishing between acts of piracy and acts of war would involve analyzing Congress's intent in enacting the piracy statute, as well as the United States' recognition position. *Palmer* therefore does not suggest that the Court believed Congress shared in the recognition power.

II. SECTION 214(d) UNCONSTITUTIONALLY INTERFERES WITH THE PRESIDENT'S EXCLUSIVE RECOGNITION POWER

Section 214(d) requires the Executive, upon request by individual citizens, to treat Jerusalem as within Israeli sovereignty in issuing U.S. passports, which are official documents addressed to foreign sovereigns. Because passports are diplomatic communications, the Executive has long used its inherent constitutional authority over the content of passports to ensure that their birthplace designations conform to the President's recognition decisions. By reversing that practice with respect to Jerusalem, Section 214(d) infringes the core of the President's exclusive recognition power. Since Israel's founding, every President has adhered to the position that the status of Jerusalem should not be unilaterally determined by any party. Section 214(d) would require the Executive simultaneously to express precisely the opposite position in a subset of the Executive's official communications with foreign sovereigns, and to do so at the behest of individual citizens seeking to express their personal views on what the Nation's position should be.

Congress's attempt to force the Executive into that Janus-like posture is an unconstitutional impingement on the Executive's recognition power and its conduct of foreign affairs based on that power. The effective exercise of the recognition power—the prerogative to determine and communicate the position of the United States on matters of recognition—turns on the Executive's ability to be the single authoritative voice of the United States' position. A decision by this Court requiring the Executive to implement Section 214(d) would force the Executive to take inconsistent positions in conducting foreign relations on behalf of the United States, thereby undermining the President's credibility and his conduct of sensitive diplomatic efforts.

A. The Executive Has Constitutional Authority To Determine The Content Of Passports As It Relates to Recognition

1. *The Executive possesses constitutional authority over passports as instruments of diplomacy*

a. A passport, this Court has explained, is an instrument of diplomacy, see *Haig v. Agee*, 453 U.S. 280, 292-293 (1981), through which the President, on behalf of the United States, “in effect request[s] foreign powers to allow the bearer to enter and to pass freely and safely, recognizing the right of the bearer to the protection and good offices of American diplomatic and consular officers,” *United States v. Laub*, 385 U.S. 475, 481 (1967); J.A. 22 (reproducing petitioner’s passport). Thus, although a passport functions on one level as a “travel control document” that provides “proof of identity and proof of allegiance to the United States,” it is also an official communication “by which the Government vouches for the bearer and for his conduct.” *Agee*, 453 U.S. at 293; see also *Urtetiqui v. D’Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835).

Because a passport is a document through which the President communicates with foreign sovereigns, the authority to issue passports historically has been understood to flow directly from his inherent constitutional power regarding “the national security and foreign policy of the United States.” *Agee*, 453 U.S. at 293. From the time of the Founding, the Executive Branch has issued passports, even though no statute addressed its authority to do so until 1856. See, e.g., U.S. Dep’t of State, *The American Passport* 8-21 (1898); *Urtetiqui*, 34 U.S. (9 Pet.) at 699. The Executive also determined the content of those passports insofar as that content relates to the conduct of diplomacy, see *The American Passport* 77-86, an authority that flowed naturally from passports’ character as instruments of official communication to other nations.

Congress historically has “endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports.” *Agee*, 453 U.S. at 294. When Congress enacted the first Passport Act in 1856, it did so to “confirm[] an authority already possessed and exercised by the Secretary of State” and to establish that the Secretary’s authority was exclusive of state and local governments. *Id.* at 294-295 & n.27 (citation omitted). Accordingly, the 1856 statute, using “broad and permissive language,” *id.* at 294, provided that “the Secretary of State shall be authorized to grant and issue passports * * * under such rules as the President shall designate.” Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. 60; see Rev. Stat. § 4075 (1875) (replacing “shall be authorized” with “may”).

* * * *

2. *Any passport legislation must be in furtherance of Congress’s enumerated powers, and may not interfere with the Executive’s recognition determinations*

a. Although Article I of the Constitution does not expressly confer any “passport power” on Congress, that body has the authority to regulate passports in furtherance of its enumerated powers, including its powers over immigration and foreign commerce. But because a passport is a diplomatic document, and the Executive Branch has long exercised constitutional authority to determine the content of passports insofar as it pertains to the conduct of diplomacy, separation-of-powers principles prohibit Congress from exercising its authority over the content of passports in a manner that interferes with the President’s exclusive authority.

That conclusion is reinforced by Congress's historic acknowledgment of the Executive's broad authority over the content and use of passports. . . . The current Passports Act continues that tradition, as it provides that the Secretary of State "may grant and issue passports * * * under such rules as the President shall designate and prescribe." 22 U.S.C. 211a; see 22 C.F.R. 51.1-51.74; 7 FAM 1300 (2014).

b. The relatively few statutes that Congress has passed governing passports demonstrate the extent to which Congress has left the content of passports, and their use as instruments of diplomacy, to the Executive. Those statutes also demonstrate how radically Section 214(d) departs from the traditional realm of passport legislation.

For example, Congress has exercised its powers over foreign commerce and border control to enact statutes requiring passports for certain travel or limiting particular persons' travel, as well as prohibitions on application fraud and passport tampering. See, e.g., 8 U.S.C. 1185(b); 22 U.S.C. 212a, 2714; 42 U.S.C. 652(k); 8 U.S.C. 1365b, 1504, 1732; 18 U.S.C. 1542-1544. Congress has also regulated the issuance of passports to aliens abroad and the use of passports as proof of citizenship, in aid of its control over immigration and naturalization. 22 U.S.C. 212, 2705, 2721. None of those statutes purports to regulate passports' content, much less the Executive's authority to determine that content as it relates to the United States' foreign-relations interests.

Congress has also enacted passport legislation that assists the Executive in implementing its authority over passports. See U.S. Const. Art. I, § 8, Cl. 14. For instance, Congress has prohibited passport issuance by anyone but the Secretary of State, 22 U.S.C. 211a, and it has also regulated fees, 22 U.S.C. 214, 214a; 10 U.S.C. 2602, and time limits, 22 U.S.C. 217a.

In vivid contrast to those statutes, Section 214(d) purports to regulate passport content by requiring the Executive, upon request, to designate "Israel" as the birthplace of U.S. citizens born in Jerusalem. In enacting Section 214(d), Congress did not suggest, as the Senate now does in its amicus brief (at 2), that the provision was necessary and proper to further Congress's powers over foreign commerce and naturalization. Rather, Section 214(d) is part of a section entitled "United States policy with respect to Jerusalem as the capital of Israel," a title that petitioner concedes "sounds more in foreign policy than in passport regulation." Pet. Br. 19. Even accepting the contention (Senate Amicus Br. 25) that, despite its title, Section 214(d) seeks only to facilitate "self-identification" of U.S. citizens . . . , it is difficult to discern even an attenuated connection between that purpose and naturalization (*i.e.*, setting the conditions on which individuals may become citizens) or foreign commerce (*i.e.*, controlling travel or entry). Section 214(d) bears so little resemblance to the passport regulations Congress has traditionally enacted that it can fairly be characterized as "passport legislation" (Pet. Br. 19) only in the sense that it uses passports as a vehicle to achieve a recognition-related objective.

B. Section 214(d) Unconstitutionally Forces The Executive To Communicate To Foreign Sovereigns That The United States Views Israel As Exercising Sovereignty Over Jerusalem

By requiring the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns, Section 214(d) unconstitutionally encroaches on the President's core recognition authority. See, e.g., *Chadha*, 462 U.S. at 946-948; *Buckley v. Valeo*, 424 U.S. 1, 129 (1976); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1871).

1. The place-of-birth designation on passports and reports of birth abroad implements the Executive's recognition policy

In order to implement its recognition policy regarding Jerusalem, the Executive Branch takes care to ensure that its communications with foreign sovereigns and other public statements express a consistent message: The United States does not recognize any sovereignty, including Israeli sovereignty, over Jerusalem. The State Department's policy of listing "Jerusalem," not "Israel," as the birthplace in passports and reports of birth abroad for U.S. citizens born in Jerusalem is one expression of the United States' recognition policy. J.A. 49-50. It is also an exercise of the President's constitutional authority to determine the content of passports insofar as that content pertains to his conduct of diplomacy.

a. To be sure, the primary function of the place-of-birth entry on a passport is to assist in identifying the passport holder and to distinguish the individual from other persons having similar names. J.A. 70, 78. But the decision as to how to describe the place of birth—*i.e.*, to list a particular country name, or to designate a particular city or region as being within a country—necessarily operates as an official statement of whether the United States recognizes a state's sovereignty over a territorial area. By its nature, a passport is not a document that expresses the views of its bearer on matters of recognition. It is a document that expresses the official position of the United States.

Accordingly, the State Department has long maintained rules that align place-of-birth designations with U.S. recognition policies. See generally J.A. 109-149 (7 FAM 1383). Such designations have been included in U.S. passports since the early twentieth century. J.A. 202. When individuals have protested the country listed on their passports—particularly when boundaries shifted after World War II—the Department has uniformly explained that its policy is to ensure that the birthplace designation is consistent with the present "sovereignty recognized by our Government." J.A. 204, 207-209 (citation omitted). That policy continues in force today: While the Department generally lists the "country of the applicant's birth" in passports, the Department will refrain from designating a country whose sovereignty over the relevant territory the United States does not recognize. J.A. 111. The State Department accordingly maintains detailed rules governing place-of-birth designations. J.A. 109-149. The designation of "Jerusalem" in passports and consular reports of birth abroad is a specific—and particularly sensitive—application of the Executive's foreign-policy and recognition decisions.

b. Petitioner's arguments (Br. 21-22, 25-26) that the State Department's place-of-birth rules do not implement recognition policy are unavailing.

Petitioner first argues (Br. 25) that the FAM permits the listing of localities that are not sovereignties. That is beside the point. The Department's policy does not require a recognized sovereign to be listed; rather, it simply prohibits listing as a place of birth a country whose sovereignty over the relevant territory the United States does not recognize. J.A. 111. Thus, a "city or area" may be listed in cases of disputed territory. *Ibid.*

Finally, contrary to petitioner's arguments (Br. 21- 22), the State Department's policy regarding the designation of Taiwan as a birthplace is fully consistent with the Executive's general position on birthplace designations. In 1994, Congress provided for the Department to permit U.S. citizens born on Taiwan to request that "Taiwan" be recorded as their birthplace rather than "China." See Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 132, 108 Stat. 395, as amended by Act of Oct. 25, 1994, Pub. L. No. 103-415, § 1(r), 108 Stat. 4302. The United States recognizes the People's Republic of China as the sole legal government of China, but it merely acknowledges the Chinese position that there is only

one China and that Taiwan is part of China. J.A. 154. Because the United States does not take a position on the latter issue, the Department concluded that listing either “Taiwan” or “China” would convey a message consistent with the President’s recognition policy—either option involves a geographic description, not an assertion that Taiwan is or is not part of sovereign China. Here, by contrast, the State Department has concluded that designating “Israel” as the place of birth would directly conflict with the United States’ refusal to recognize Israeli sovereignty over Jerusalem. The Department’s decisions concerning Jerusalem and Taiwan demonstrate the fact-specific foreign-policy judgments that the Department must make in ensuring that passports are consistent with the President’s recognition policy. See, e.g., *Regan v. Wald*, 468 U.S. 222, 242-243 (1984).

2. Section 214(d) unconstitutionally interferes with the Executive’s core recognition power

a. Section 214(d) requires the Executive to alter its official passport policy with respect to Jerusalem. Its enforcement would result in the Executive’s issuing passports acknowledging Israel’s sovereignty over Jerusalem. That message would arise not simply from the individual passports themselves, but from the context of the Executive’s passport policy and Section 214. Foreign sovereigns (and other foreign and domestic audiences) understand that the United States does not identify a state as a birthplace on passports unless doing so is consistent with U.S. recognition policy. See J.A. 88, 228-229. Foreign sovereigns would also be aware that the Executive is designating “Israel” pursuant to a statute whose explicit purpose is to express “United States policy with respect to Jerusalem as the capital of Israel.” § 214, 116 Stat. 1365 (capitalization altered). Section 214’s other subsections reinforce the point, as they require the President to take other steps—relocating the U.S. embassy and memorializing Jerusalem’s asserted status in official documents—that would connote recognition of Jerusalem as Israel’s capital. § 214(a), (b), (c), 116 Stat. 1365-1366. And the legislative history reiterates that Section 214 “contains four provisions related to the recognition of Jerusalem as Israel’s capital.” See H.R. Conf. Rep. No. 671, 107th Cong., 2d Sess. 123 (2002).

For those reasons, the Executive has determined that complying with Section 214(d) would communicate that the United States has “prejudg[ed]” Jerusalem’s status and reversed its decades-long policy of not taking any official action that could be perceived as constituting recognition of Israeli sovereignty over Jerusalem. J.A. 55-56. That conclusion is a foreign relations judgment entitled to substantial deference. See, e.g., *Regan*, 468 U.S. at 242-243; *Curtiss-Wright*, 299 U.S. at 319. It is also indisputable, as the reaction that ensued when Section 214 was enacted demonstrates. See J.A. 57-58 (Palestinian officials condemned Section 214 as “undervaluing” Palestinian and Arab “rights in Jerusalem”) (citation omitted); J.A. 230-234.

By forcing the Executive to communicate in official government documents that Israel has sovereignty over Jerusalem, Section 214(d) infringes the President’s core recognition power. The President’s exclusive authority to decide the United States’ recognition policy would be greatly undermined if Congress, disagreeing with that policy, could force the Executive Branch to make official statements in foreign relations that are inconsistent with the Executive’s determinations. Other sovereigns would be unable to rely on the President’s assurances, which would prevent the Executive from using its recognition position to advance U.S. foreign-relations interests. There are few contexts in which the President’s role as the “sole organ” of the Nation in foreign affairs is more crucial. *Curtiss-Wright*, 299 U.S. at 319-320.

These consequences would be particularly severe in the extraordinarily sensitive context of this case. The United States' position on Jerusalem has always been a crucial principle undergirding U.S. foreign policy in the region, and since 1948 each President has taken care to articulate that position clearly and precisely. . . . Section 214 has already damaged the President's ability to convey his position on Jerusalem, as many in the Arab world discounted President Bush's assurances, in his signing statement, that U.S. policy had not changed. J.A. 231-234. Doubt that the United States remains committed to negotiations on Jerusalem's status would only deepen if this Court were to require the Executive to implement Section 214(d) and begin asserting in official documents that Jerusalem is under Israeli sovereignty. Because U.S. policy toward Jerusalem is inextricably linked to this Nation's broader foreign policy in the region, confusion about the President's recognition position could undermine the United States' credibility with the parties to the peace process. Compliance with Section 214(d) also "could provoke uproar throughout the Arab and Muslim world and seriously damage our relations with friendly Arab and Islamic governments, adversely affecting relations on a range of bilateral issues, including trade and treatment of Americans abroad." J.A. 59.

Because Section 214(d) interferes with the President's core recognition power, it is unconstitutional. Amici House Members argue, however, that Section 214(d) should be held invalid only if it "prevents the Executive Branch from accomplishing its constitutionally assigned functions," and there is no "overriding need" to promote objectives within Congress's authority. House Members Amicus Br. 21-22 (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977)). But "where the Constitution by explicit text commits the power at issue to the exclusive control of the President," the Court has "refused to tolerate any intrusion by the Legislative Branch." *Public Citizen v. DOJ*, 491 U.S. 440, 485, 486-487 (1989) (Kennedy, J., concurring in the judgment); see also *Chadha*, 462 U.S. at 945; *Morrison v. Olson*, 487 U.S. 654, 711-712 (1988) (Scalia, J., dissenting). In any event, Section 214(d) does prevent the Executive from accomplishing its constitutionally assigned function of establishing recognition policy concerning Jerusalem. And petitioner and his amici have not identified anything close to an "overriding need" to permit private citizens, who have no individual rights in the conduct of the Nation's foreign relations, see *Kennett*, 55 U.S. (14 How.) at 49-50, to use the birthplace designation on their passports to express their personal views, at the expense of the Nation's established policy. Indeed, because Section 214(d) gives private citizens an option, it would not even establish a uniform rule in its sphere of operation.

b. Petitioner's and amici's remaining arguments that Section 214(d) does not interfere with the President's recognition power lack merit.

Petitioner, joined by the Senate and House Members as amici, argues that Section 214(d) merely permits individuals to "identify themselves as born in 'Israel.'" Pet. Br. 16; House Members Amicus Br. 25; Senate Amicus Br. 21. Section 214's text and operation refute that argument. The statute's express purpose is to establish "United States policy with respect to Jerusalem as the capital of Israel." . . . And Section 214(d)'s one-sided operation—it does not permit Palestinian-Americans born in Jerusalem after 1948 to self-identify as being born in "Palestine"—is inconsistent with fostering "self-identification." In any event, even if Section 214(d) had a "self-identification" component, it is one that requires public endorsement by the Executive—in official documents.

Petitioner also contends (Br. 19) that constitutional avoidance principles support disregarding Section 214's title and its other subsections. Those principles are inapposite here. There is no dispute that Section 214(d) would require the Executive, upon request, to designate

“Israel” in the passports and reports of birth abroad of U.S. citizens born in Jerusalem. The question in this case is whether that mandate impermissibly interferes with the President’s exclusive recognition power. Cf. *National Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598 (2012). The answer to that question would be “yes” even if Section 214 had a more innocuous title. The title exacerbates Section 214(d)’s unconstitutional effect by confirming to the world that Congress intended to require the Executive to take steps in furtherance of recognizing Jerusalem as the capital of Israel.

Petitioner next contends (Br. 63) that implementation of Section 214(d) would have “negligible” foreign policy consequences. The President’s recognition power, however, does not depend on a showing that a particular recognition determination is necessary to avoid adverse foreign-relations consequences. In any event, the Executive has determined, exercising its expertise as the Branch responsible for diplomacy, that deviating from longstanding passport practice would have severe adverse foreign-relations consequences. J.A. 53. That judgment is entitled to substantial deference. See *Regan*, 468 U.S. at 242-243.

Relatedly, petitioner argues (Br. 17) that any harm to the United States’ foreign-relations interests would be the result of “misperception” by the Arab world, which could be mitigated by American reassurances. But anger and confusion among foreign entities would be the direct result of Section 214(d)’s requirement that the Executive contradict its recognition position—not mere “misperceptions.” Simply reaffirming the President’s recognition policy—while being compelled to implement Section 214(d)—is no remedy. Section 214(d)’s mandate makes the Executive’s reaffirmance of its longstanding Jerusalem policy less credible and therefore less likely to be effective. J.A. 232-234.

That is precisely why it is unconstitutional.

* * * *

Cross References

U.S. objections to Palestinian Authority efforts to accede to treaties, **Chapter 4.A.1.**

Purported treaty between Abkhazia region and Russia, **Chapter 4.A.2.**

Definition of “foreign state” in FSIA, **Chapter 10.A.1.**

Response to downing of Malaysia Airlines flight in Ukraine, **Chapter 11.A.3.**

Russia/Ukraine sanctions, **Chapter 16.A.5.**

Middle East peace process, **Chapter 17.A.**

Russia and Ukraine, **Chapter 19.B.10.c.**