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### Compelled Diplomacy in Zivotofsky v. Kerry

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## COMPELLED DIPLOMACY IN *ZIVOTOFSKY V. KERRY*

Ryan M. Scoville\*

### INTRODUCTION

The basics of *Zivotofsky v. Kerry* are by now familiar. Congress enacted Section 214(d) of the Foreign Relations Authorization Act of 2003 to require that the Secretary of State record “Israel” as the country of birth on the passport of any Jerusalem-born U.S. citizen who so requests,<sup>1</sup> but two successive presidential administrations have refused to implement the statute. To the parties and lower courts, this has primarily been a dispute about the nature of the President’s power to recognize foreign borders. But what if the law also raises another, entirely separate issue under Article II?

Consider the possibility that § 214(d) is unconstitutional not because it recognizes a border or materially interferes with the implementation of U.S. recognition policy, but simply because it purports to compel diplomatic speech that the President opposes. From this angle, *Zivotofsky* presents a question about who controls official diplomatic communications, and recognition is beside the point.

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<sup>1</sup> Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002).

## I. The Statute is Not an Act of Recognition

*Zivotofsky* has a number of conceivable resolutions even if the recognition power belongs exclusively to the President. One is to hold that § 214(d) is unconstitutional because it infringes on the President's power by requiring or effecting a formal change in U.S. recognition policy. But this approach would be problematic. The Supreme Court is "obligated to construe . . . statute[s] to avoid constitutional problems if it is 'fairly possible' to do so"<sup>2</sup> and assumes that Congress operates with respect for background principles of law.<sup>3</sup> In the recent case of *Bond v. United States*, the Court demonstrated a willingness to apply these canons aggressively in cases presenting constitutional challenges to enactments that implicate foreign relations.<sup>4</sup> The central question on appeal was whether federalism constrains Congress's power to implement treaties, but *Bond* sidestepped the issue by simply interpreting the challenged statute not to apply.<sup>5</sup> According to the majority, "a fair reading of statutory text" requires "recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions,"<sup>6</sup> and a court should not interpret a statute as departing from those presumptions absent a "clear indication" of legislative intent.<sup>7</sup> Some commentators thought the provision in question to be plainly applicable, but a majority of the Justices found the text ambiguous and thus insufficient to overcome a presumption that Congress legislates in ways that honor the traditional spheres of federal and state power.<sup>8</sup> Particularly after *Bond*, the Court appears unwilling to con-

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<sup>2</sup> *Boumediene v. Bush*, 553 U.S. 723, 787 (2008).

<sup>3</sup> *Bond v. United States*, 134 S. Ct. 2077, 2088-93 (2014).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 2087-93.

<sup>6</sup> *Id.* at 2088 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

<sup>7</sup> *Id.* at 2090.

<sup>8</sup> *Id.* at 2033.

strue foreign relations statutes in ways that generate constitutional concerns unless absolutely necessary.

Thinking in a loosely *Bond*-like way means that the initial task in *Zivotofsky* is to identify whether there might be any “unexpressed presumptions” relevant to the interpretation of § 214(d). A reasonable answer is yes. In the past, the president has recognized states by negotiating treaties with them, making declarations, dispatching diplomatic agents, and issuing exequaturs.<sup>9</sup> Not only is that practice consistent with the historical international law on recognition,<sup>10</sup> there appear to be at most two occasions on which Congress has purported to recognize a foreign sovereign since 1787, and neither of those involved passports.<sup>11</sup> An earlier edition of the Restatement went so far as to explain that the “issuance of passports that permit travel in [an] area controlled by [an] unrecognized regime” does not amount to implied recognition.<sup>12</sup> Modern Supreme Court precedent has consistently described recognition as an executive power.<sup>13</sup> And without causing any apparent disturbance to U.S. policy against the recognition of Taiwanese independence, a law similar to § 214(d)

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<sup>9</sup> JOHN G. HERVEY, *THE LEGAL EFFECTS OF RECOGNITION IN INTERNATIONAL LAW* 18 (1928); *RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 104 cmt. a (1965).

<sup>10</sup> See TI-CHIANG CHEN, *THE INTERNATIONAL LAW OF RECOGNITION* 189-223 (L. C. Green ed., 1951) (discussing modes of recognition); H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 369-403 (1947) (same).

<sup>11</sup> Robert Reinstein finds that Congress has recognized foreign sovereigns on four occasions: (1) an 1800 statute declaring the island of Hispaniola to be a dependency of France, (2) an 1806 statute prohibiting trade with an independent Haiti, (3) an 1861 statute authorizing the appointment of diplomatic representatives to Haiti and Liberia, and (4) an 1898 joint resolution declaring Cuba’s independence from Spain. See Robert J. Reinstein, *Is the President’s Recognition Power Exclusive?*, 86 *TEMP. L. REV.* 1 (2013). I question, however, whether two of these are true examples of recognition. See Ryan Scoville, *De Jure and de Facto Recognition as a Framework for Zivotofsky*, *OPINIO JURIS* (Apr. 30, 2014, 2:14 AM), <http://opiniojuris.org/2014/04/30/guest-post-de-jure-de-facto-recognition-framework-zivotofsky/>.

<sup>12</sup> *RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 104 cmt. c (1965).

<sup>13</sup> See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964); *Nat’l City Bank v. Republic of China*, 348 U.S. 356, 358 (1955).

grants some U.S. citizens the option to list “Taiwan” as the place of birth on their passports.<sup>14</sup> In short, the idea that a passport statute can independently accomplish a change in recognition policy is so odd that it is fair to start with the presumption that Congress never considered it.<sup>15</sup> To overcome that presumption there should be clear evidence of legislative intent to effectuate a bold new policy through unprecedented means.

I think § 214(d) falls short of that mark. First, the text suggests a modest aim. “Israel” will appear on the passport of an American born in Jerusalem only when the individual bearer has requested as much,<sup>16</sup> and only for limited purposes such as “registration of birth.”<sup>17</sup> These constraints create a realistic possibility that the statute is simply about personal identification; going forward, some will exercise the statutory right as a matter of individual preference, while others will not. Notably, the law does not expressly claim a recognition effect.<sup>18</sup>

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<sup>14</sup> Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 132, 108 Stat. 382, 395 (“For purposes of the registration of birth or certification of nationality of a United States citizen born in Taiwan, the Secretary of State shall permit the place of birth to be recorded as Taiwan.”).

<sup>15</sup> This argument implies an answer to the core question of who holds the recognition power, but one could make an analogous critique of the Court’s analysis in *Bond*—i.e., using a federalism presumption to resolve the meaning of ambiguous treaty-implementing legislation implies that federalism is a relevant principle for that type of enactment, which in turn suggests that *Missouri v. Holland* was wrong in holding that federalism does not limit Congress’s power to implement treaties. See *Bond*, 134 S. Ct. at 2088-93.

<sup>16</sup> Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002).

<sup>17</sup> *Id.*

<sup>18</sup> A report from the Senate Committee on Foreign Relations described 214(d) and its companion provisions as “related to the recognition of Jerusalem as Israel’s capital,” but that seems insufficient. S. Rep. No. 107-60, at 12 (2001). Aside from the fact that the report is legislative history, the statute could be “related” to recognition in a number of ways other than as a device by which to accomplish recognition, including as a signal of congressional displeasure with the national policy. Foreign Relations Authorization Act, Fiscal Year 2003 § 214(d).

Second, § 214(d) does not trigger any of recognition's traditional consequences. It is well known that recognition entitles the recipient to send diplomatic agents, sue and invoke certain sovereign defenses in U.S. courts, and otherwise exercise the prerogatives of statehood in relations with the United States.<sup>19</sup> Yet no one thinks these rights hinge on a passport statute. Not even the Administration contends, for example, that § 214(d) extends the act of state doctrine to the operations of the Israeli government in Jerusalem.<sup>20</sup> Neither do the House and Senate.<sup>21</sup> It seems untenable, therefore, to interpret § 214(d) as formally changing U.S. policy on the status of Jerusalem.

## II. The Statute Probably Does Not Interfere with Recognition Policy

Another possible resolution is to hold that the statute is unconstitutional because it infringes on the President's recognition power not by formally canceling a U.S. policy of neutrality, but rather by forcing the President to issue official diplomatic communications that interfere with the policy's implementation. This is the Administration's central argument,<sup>22</sup> and it relies on the premise that Article II confers authority not only to recognize, but also to give effect to determinations on recognition. The argument avoids the textual and precedential difficulties that arise from reading the statute as an act of recognition, while still drawing strength from the predomi-

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<sup>19</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 205 cmt. a (1987) (right to sue in U.S. courts); *Nat'l City Bank v. Republic of China*, 348 U.S. 356, 359 (1955) (right to assert sovereign immunity); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303 (1918) (right to assert the act of state doctrine).

<sup>20</sup> See Brief for the Respondent in Opposition at 11-23, *Zivotofsky v. Kerry*, No. 13-628 (U.S. argued Nov. 3, 2014).

<sup>21</sup> Brief for Members of the United States House of Representatives as *Amici Curiae* in Support of Petitioner, *supra* note 20, at 22; Brief for the United States Senate as *Amicus Curiae* Supporting Petitioner, *supra* note 20, at 20-21..

<sup>22</sup> See Transcript of Oral Argument, *supra* note 20, at 25.

nant sense that the statute implicates an exclusively executive domain.

It is not obvious, however, that the Administration should prevail with this approach. Even assuming that the recognition power contains a related power to render an executive determination effective, it is unclear what that rule would permit of the courts and Congress. One option is that it only precludes the other branches from negating a determination's legal consequences. Here, a statute might impinge on Article II by purporting, for example, to deny sovereign immunity to a duly recognized state or granting immunity to one that the President refuses to recognize. Yet the Administration probably loses under such an analysis—§ 214(d) would pass muster because, as suggested above, it does not superimpose any of the traditional legal consequence of recognition onto an executive policy of neutrality.

A second option would give Article II a broader sweep by holding that the recognition power precludes the other branches from engaging in any activity that foreign governments might reasonably interpret as inconsistent with the President's determination. This appears to be the Administration's view,<sup>23</sup> and it would likely render § 214(d) invalid insofar as the statute sows confusion among foreign governments. But this approach has several weaknesses. First, there does not appear to be much risk of confusion at a retail level. The petitioners seek to have Menachem Zivotofsky's passport say "Israel," not "Jerusalem, Israel."<sup>24</sup> Given that this language makes no explicit claim about the city's status, it is hard to believe that it would give foreign customs officials any impression about U.S. policy, let alone a false one.

Second, it is questionable that substantial confusion results from the statute even at a more wholesale level. Both houses of

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<sup>23</sup> Brief for the Respondent, *supra* note 20, at 53-54.

<sup>24</sup> Transcript of Oral Argument, *supra* note 20, at 14.

Congress understand § 214(d) as leaving U.S. policy undisturbed,<sup>25</sup> and the Administration's focus on interference with the implementation of neutrality implicitly concedes the point.<sup>26</sup> In other words, neither of the political branches views the statute as officially recognizing Jerusalem as part of Israel. To anticipate foreign confusion in these circumstances is to suggest that governments will read into the law a meaning that Congress and the President have not espoused. These governments, if they exist, are a very particular breed—sufficiently informed to know about § 214(d), but sufficiently uninformed to think it means something other than what the U.S. Government says it means. I am skeptical that this is a valid source of constitutional concern; any government that pays attention must know that the United States retains an official policy of neutrality.

Finally, even if the statute or individual passports generate confusion, holding § 214(d) unconstitutional will not create clarity. The federal judiciary—including the D.C. Circuit—has referred to Jerusalem as part of Israel in dozens of published decisions over the years.<sup>27</sup> And as one amicus brief points out, the Central Intelligence Agency, National Geospatial Intelligence Agency, and Interior Department's Board of Geographic Names routinely refer to Jerusalem as part of Israel in public documents.<sup>28</sup> Even though this usage is

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<sup>25</sup> See Brief for Members of the United States House of Representatives as *Amici Curiae* in Support of Petitioner, *supra* note 20, at 22.; Brief for the United States Senate as *Amicus Curiae* Supporting Petitioner, *supra* note 20, at 20-21.

<sup>26</sup> Transcript of Oral Argument, *supra* note 20, at 25, 35.

<sup>27</sup> See, e.g., *United States v. Holy Land Found. for Relief & Dev.*, 722 F.3d 677, 681 (5th Cir. 2013); *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 785 (7th Cir. 2011); *Hassan v. Holder*, 604 F.3d 915, 917 (6th Cir. 2010); *Wexler v. Westfield Bd. of Ed.*, 784 F.2d 176, 179 (3d Cir. 1986); *Ilan-Gat Eng'rs, Ltd. v. Antigua Int'l Bank*, 659 F.2d 234, 236 (D.C. Cir. 1981); *Rothstein v. UBS AG*, 647 F. Supp. 2d 292, 293 (S.D.N.Y. 2009); *Medtronic Vascular, Inc. v. Boston Scientific Corp.*, 348 F. Supp. 2d 316, 319 (D. Del. 2004); *Menechem v. Frydman-Menachem*, 240 F. Supp. 2d 437, 439 (D. Md. 2003); *Weinstein v. Friedman*, 859 F. Supp. 786, 789 (E.D. Pa. 1994); *Kahane v. Sec'y of State*, 700 F. Supp. 1162, 1164 (D.D.C. 1988).

<sup>28</sup> Brief of the Louis D. Brandeis Center for Human Rights Under Law and Professors of Foreign Relations and Constitutional Law as *Amici Curiae* in Support of Petitioner, *supra* note 20, at 26-28.



diametrically at odds with a national policy of strict neutrality, the President apparently tolerates it, and it will presumably continue after *Zivotofsky*. True, the State Department issues passports to facilitate international travel, so foreign governments will view the contents of these documents even while potentially overlooking other publications that refer to Jerusalem in disfavored ways. In that regard, § 214(d) could cause greater disruption to foreign relations. But in an era when even most domestic actions have an unavoidable international audience, this seems like a distinction without practical significance. Moreover, passport details are even further removed from recognition than other official usage insofar as they reflect the personal identification preferences of private citizens.

### III. The Statute Compels Diplomacy

Whatever one thinks about the recognition question, § 214(d) might suffer from a separation of powers problem that the parties and lower courts have not directly addressed. The issue is that while the President has extensive power over whether and how to engage the United States in official diplomatic communications with foreign sovereigns,<sup>29</sup> § 214(d) constitutes a legislative attempt to dictate the content of some of those communications through the medium of the passport. In other words, the statute does not intrude upon Article II as an act that changes or interferes with U.S. recognition policy, but it might intrude as an attempt to compel official diplomacy.

The foundation for this idea is that the United States has long treated the passport as a diplomatic document with a communicative function. As the Supreme Court explained in 1835, this is

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<sup>29</sup> See Ryan M. Scoville, *Legislative Diplomacy*, 112 MICH. L. REV. 331, 332 (2013) (describing the traditional view about the president's control over diplomatic communications).

a document which, from its nature and object, is addressed to [a] foreign power; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact.<sup>30</sup>

Passports thus constitute a formal U.S. request for safe passage and a representation about the identity of the bearer. While the document has since acquired the additional function of controlling departure from U.S. territory, it retains its diplomatic character in modern practice.<sup>31</sup> The result is that a statute dictating the content of a passport is in effect an order for the President to engage in a specified form of diplomacy. In the case of an individual who exercises her right under § 214(d), that diplomacy must entail an official representation that the bearer has chosen to identify herself as a person born in Israel.

It is not clear that this practice is compatible with the separation of powers. On one hand, the President has not consistently objected to legislative interventions in diplomatic affairs. Over the last several decades Congress passed a variety of statutes that aim to dictate executive communications to foreign governments. For instance, the Metric Conversion Act of 1975 required the U.S. Metric Board to consult with foreign officials to develop international support for metric standards proposed by the United States.<sup>32</sup> The Trade and Tariff Act of 1984 mandated that the U.S. Trade Representative “seek to obtain the reduction or elimination of . . . export perfor-

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<sup>30</sup> *Urtetiqui v. D’Arcy*, 34 U.S. 692, 699 (1835) (quoted in *Kent v. Dulles*, 357 U.S. 116, 120 (1958)); see also *Haig v. Agee*, 453 U.S. 280, 292 (1981) (“A passport is, in a sense, a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer.”).

<sup>31</sup> *Haig*, 453 U.S. at 293.

<sup>32</sup> Pub. L. No. 94-168, § 2, 89 Stat. 1007 (codified at 15 U.S.C. 205e(6)).

mance requirements through consultations and negotiations” with foreign governments whose requirements adversely affect U.S. economic interests.<sup>33</sup> Dodd-Frank obliges the Treasury Department to consult with foreign regulatory authorities in investigating and addressing economic risks posed by overseas financial companies.<sup>34</sup> And the list goes on.<sup>35</sup> As far as I can tell, only twice has the President objected that any of these mandates conflict with the separation of powers.<sup>36</sup>

On the other hand, there are a number of reasons to think that congressional attempts to compel diplomacy violate Article II. First, other than perhaps the Declare War Clause, which expressly grants Congress control over a discrete category of international communication,<sup>37</sup> the Constitution assigns exclusively to the President all power to interface with foreign nations on behalf of the United States.<sup>38</sup> Article I supports this position by generally omitting sover-

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<sup>33</sup> Pub. L. No. 98-573, § 307(1), 98 Stat. 3012 (codified at 19 U.S.C. § 2114d(1)).

<sup>34</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 112(d)(3)(C), 113(f)(3), 113(i) & 175(c), 12 U.S.C. §§ 5322(d)(3)(C) (2012), 5323(f)(3) (2012), 5323(i) & 5373(c) (2012).

<sup>35</sup> See, e.g., Religious Freedom Act of 1998, Pub. L. No. 105-292, § 403(b) 22 U.S.C. § 6443(b) (2012); Deepwater Port Act Amendments of 1984 § 5(a)(3), 33 U.S.C. § 1518(a)(3) (2012); Deep Seabed Hard Minerals Resources Act § 118(f), 30 U.S.C. § 1428(f) (2012); Fishery Conservation and Management Act of 1976 § 204(b)(9), 16 U.S.C. § 1824(b)(9) (2012); ); Fisherman’s Protective Act of 1967 (codified at 22 U.S.C. § 1975(a)(1)).

<sup>36</sup> See William J. Clinton, Statement on Signing the International Religious Freedom Act of 1998, 34 WKLY COMPILATION PRES. DOCS. 2149, 2149 (1998); Gerald R. Ford, Statement on Signing the Fishery Conservation and Management Act of 1976 (Apr. 13, 1976), AM. PRESIDENCY PROJECT, available at: <http://www.presidency.ucsb.edu/ws/index.php?pid=5841>.

<sup>37</sup> U.S. CONST. art. I, § 8, cl. 11. Even here, Congress’s power is limited; it is one thing to say that Congress has power to declare war, but another to say that Congress has power to *transmit* that declaration to a foreign recipient.

<sup>38</sup> See, e.g., In re Metzger, 46 U.S. 176, 181 (1847) (“Under our institutions there exists but one legitimate channel of communication between this and any foreign nation; that organ is the executive.”).

eign diplomacy from the enumerated powers of Congress,<sup>39</sup> and Article II provides further support by establishing executive powers that logically require diplomacy for their exercise.<sup>40</sup> Use of the power to make treaties or receive ambassadors, for example, necessarily entails communication with a foreign sovereign.<sup>41</sup>

Second, there is precedent for treating the conferral of a power in Article II as prohibiting Congress not only from exercising that power, but also from imposing restraints on the manner in which the President exercises it. For instance, it is accepted that Congress cannot restrict the President's use of the pardon power<sup>42</sup> or removal of cabinet officers under the Vesting Clause,<sup>43</sup> and influential commentators have argued that the President has a preclusive power to superintend the military under the Commander in Chief Clause.<sup>44</sup> If the basis for these conclusions is simply that the relevant power is located in Article II and not expressly subject to congressional limitation, then the President's power to communicate with foreign

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<sup>39</sup> With the possible exception of the Declare War Clause, Article I, Section 8 does not include any powers whose exercise necessarily entails communication with foreign governments. See U.S. CONST., art. I, § 8.

<sup>40</sup> See Scoville, *supra* note 29, at 358-63 (identifying a textual bases for executive control over diplomatic communications made on behalf of the United States).

<sup>41</sup> See Scoville, *supra* note 29, at 358-63.

<sup>42</sup> *Ex Parte Garland*, 71 U.S. 333, 380 (1866) ("The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders.").

<sup>43</sup> Cf. *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (holding that congressionally imposed restrictions on the removal of executive officers is unconstitutional if the restrictions are "of such a nature that they impede the President's ability to perform his constitutional duty" to take care that the laws are faithfully executed).

<sup>44</sup> See generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008).

governments is similarly preclusive, particularly if its source is the expansive Vesting Clause.<sup>45</sup>

To the extent that it matters, evidence of original meaning offers insight into why the Framers might have favored such a position. The Congress of the Confederation had an unimpressive track record on diplomatic affairs. It was slow in corresponding with foreign states<sup>46</sup> and had a hard time maintaining secrecy.<sup>47</sup> In addition, key participants in the ratification debates believed that the legislative branch is ill-equipped for diplomacy due to a perceived tendency for legislators to lack adequate knowledge of world affairs, act on the mercurial pressures of short-term electoral politics, and focus on the parochial interests of constituents rather than the nation as a whole.<sup>48</sup> These perceptions appear to have fueled a belief in superior executive competency.<sup>49</sup>

Finally, there is nothing new to the idea that congressional efforts to compel diplomacy might be problematic. Modern presidents have on several occasions claimed an indefeasible power to choose the particular form and manner in which to conduct sovereign diplomatic communications. For example, different administrations have declined to honor statutes that purport to restrict the President's ability to choose the individuals comprising U.S. delegations to international conferences<sup>50</sup> and the fora in which diplomatic

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<sup>45</sup> Cf. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 317-24 (2001) (arguing that the Vesting Clause is a key source of the president's power to engage in diplomacy with foreign governments).

<sup>46</sup> Scoville, *supra* note 29, at 366-67.

<sup>47</sup> Scoville, *supra* note 29, at 366-67.

<sup>48</sup> Scoville, *supra* note 29, at 367-70.

<sup>49</sup> Scoville, *supra* note 29, at 367-70.

<sup>50</sup> See Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37, 37-39, 42 (1990) (concluding that a statute interfered with executive diplomacy powers by conditioning the president's ability to obligate appropriated funds for U.S. delegations to the Conference on Security and Cooperation in Europe on his inclusion of certain individuals in the delegation).

contacts will occur.<sup>51</sup> One particularly relevant precedent comes from the first Bush Administration, which saw Congress enact a law prohibiting the Secretary of State from issuing more than one diplomatic passport to any U.S. official traveling in the Middle East.<sup>52</sup> The Administration declined to follow Congress's injunction because the "attempt to dictate to the President the scope of permissible communications with foreign governments by means of passports" interfered with the President's diplomacy power.<sup>53</sup>

In short, it is plausible that § 214(d) infringes on Article II even if the statute does not change or interfere with U.S. recognition policy. Justice Kagan seems to have suggested as much at oral argument.<sup>54</sup> One wonders whether the other Justices agree.

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<sup>51</sup> See Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act 4, 7-8 & n.9 (Op. O.L.C. June 1, 2009) (concluding that an act of Congress unconstitutionally interfered with the president's diplomacy powers by prohibiting the State Department from using appropriated funds to pay for a U.S. delegation to any UN agency, commission, or body that is chaired by a terrorist-list state).

<sup>52</sup> See Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18 (1992).

<sup>53</sup> *Id.* at 25.

<sup>54</sup> See Transcript of Oral Argument, *supra* note 22, at 20-21.