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ARTICLE

IS THE PRESIDENT'S RECOGNITION POWER EXCLUSIVE?

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The power of the United States government to recognize foreign states and governments is much broader than the authority merely to place a symbolic stamp of legitimacy on that state or government. Recognition allows foreign governments to establish diplomatic relations with the United States and also confers other substantial benefits on those governments. Despite its importance to foreign relations, the recognition power was not enumerated in the United States Constitution or discussed in the Constitutional Convention or ratification debates.

A recent decision of the Court of Appeals for the District of Columbia Circuit, Zivotofsky ex rel. Zivotofsky v. Secretary of State, is the first to hold, in the context of a conflict between an act of Congress and an executive decision, that the recognition of foreign states and governments is an exclusive executive power. A seemingly innocuous passport statute created a conflict between executive and congressional policies over a controversial, and as yet unresolved, political issue: the status of Jerusalem. The court relied on post-ratification history, which, it concluded, established that presidents consistently claimed, and Congress consistently acknowledged, that the recognition power was exclusively an executive prerogative. The passport statute was held to unconstitutionally infringe on the Executive's recognition power.

This Article provides the first in-depth analysis in nearly a century of the historical relationship of the executive and legislative branches to the recognition power. The Article examines in detail the post-ratification recognition events discussed

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by the Court of Appeals, beginning with the decisions of the Washington administration during the Neutrality Crisis in 1792–93. The Article also examines events not addressed by the Court of Appeals, most significantly early congressional acts of recognition and the 1979 Taiwan Relations Act.

The Article concludes that post-ratification history establishes an authority in the President to recognize foreign states and governments but provides little support for any claim of an exclusive recognition power. However, post-ratification history is not by itself dispositive, and the legal importance of the history is examined through the lens of certain fundamental questions, including the significance of presidential and congressional inactions, acquiescence, and acknowledgement. The Article analyzes these questions through constitutional doctrine and normative values, ultimately concluding that the constitutional text, original understanding, structure, and post-ratification evidence do not support an exclusive recognition power in the Executive. The President's recognition power is subject to the legislative control of Congress.

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I. INTRODUCTION

A statute specifying how an American's place of birth is recorded on a passport seems an unlikely candidate for a landmark decision on the separation of powers. But even an apparently innocuous passport statute can be explosive when it deals with the status of Jerusalem. A federal statute requires State Department passport officers to treat Jerusalem as part of Israel upon the request of applicants. The State Department refuses to comply with this statute because the executive branch does not recognize Israel's sovereignty over Jerusalem. The Court of Appeals for the District of Columbia Circuit recently held in *Zivotofsky ex rel. Zivotofsky v. Secretary of State*¹ that the passport statute unconstitutionally infringes the President's recognition power.²

The recognition power is much broader than the authority merely to place a symbolic stamp of legitimacy on a foreign state or government. It determines the territorial sovereignty of that state or government³ and has significant effects on both international relations and domestic law. As summarized by the Court of Appeals:

Recognition is the act by which "a state commits itself to treat an entity as a state or to treat a regime as the government of a state." "The rights and attributes of sovereignty belong to [a state] independently of all recognition, but it is only after it has been recognized that it is assured of exercising them." Recognition is therefore a critical step in establishing diplomatic relations with the United States; if the United States does not recognize a state, it means the United States is "unwilling[] to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control." Recognition also confers other substantial benefits. For example, a recognized sovereign generally may (1) maintain a suit in a United States court; (2) assert the sovereign immunity defense in a United States court; and (3) benefit from the "act of state" doctrine, which provides that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."⁴

Moreover, the recognition power also includes the authority to determine *how* the recognition decision is carried out—that is, "the policy to govern the question of

1. 725 F.3d 197 (D.C. Cir. 2013).

2. *Zivotofsky*, 725 F.3d at 220.

3. *Jones v. United States*, 137 U.S. 202, 212–14 (1890).

4. *Zivotofsky*, 725 F.3d at 205 (alterations in original) (citations omitted).

recognition.”⁵

The *Zivotofsky* decision is the first to hold that the recognition of foreign states and governments—and the determination of the scope of that recognition—is an *exclusive* executive power. This decision has significant implications for the separation of powers that go well beyond the question of recognition. If affirmed, this decision will mark only the second time that the Supreme Court will have held that a non-enumerated power of the President supersedes the legislative authority of Congress (the other being the power to remove executive officials) and the first in the field of foreign affairs.

The Supreme Court has decided a number of recognition cases stretching back to the Marshall Court, but none involved a conflict between an act of Congress and an executive decision. Each of the previous cases on recognition involved the allocation of power between the judicial and executive branches—that is, whether the courts could review the legality of executive recognition decisions. The Supreme Court’s consistent answer has been that the courts must defer to the political branches on recognition. Sometimes, the Court described the political branches in dicta as both Congress and the Executive.⁶ More frequently, the dicta stated that the recognition power was exclusively an executive function.⁷ For the D.C. Circuit, the latter dicta has now

5. *United States v. Pink*, 315 U.S. 203, 207 (1942); *United States v. Belmont*, 301 U.S. 324, 330 (1937).

6. *See, e.g., Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (“The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—‘the political’—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”); *Jones*, 137 U.S. at 212 (“Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government.”); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634 (1818) (“[Recognition decisions] belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it.”); *id.* at 643 (“[T]he courts of the union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States.”).

7. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) (“Political recognition is exclusively a function of the Executive.”); *Nat’l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 358 (1955) (“The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court.”); *Pink*, 315 U.S. at 207 (“The authority of the political department is not limited . . . to the determination of the government to be recognized. The President is also empowered to determine the policy to govern the question of recognition. Objections to the President’s determination of the government ‘as well as to the underlying policy’ must be addressed to the political department.” (quoting *Guar. Trust Co. v. United States*, 304 U.S. 126, 137–38 (1938))); *Belmont*, 301 U.S. at 330 (“The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. . . . [I]n respect of what was done here, the Executive had authority to speak as the sole organ of that government.”); *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839) (“[I]t is not . . . the province of the Court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union. . . . If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial

become a holding.

The facts of *Zivotofsky* are simple. Almost immediately following Israel's declaration of independence in 1948, President Truman recognized it as a sovereign state.⁸ However, Truman refused to recognize Israel's (or any other country's) sovereignty over Jerusalem, stating that this question must be resolved through future negotiations.⁹ To date, that executive policy has not changed. To enforce this position of neutrality, the State Department requires that, for persons born within the municipal limits of Jerusalem, the applicant's place of birth on passports must be listed as "Jerusalem," and not, for example, "Jerusalem, Israel," "Israel," or "Jordan."¹⁰

President George W. Bush signed into law the 2003 Foreign Relations Authorization Act.¹¹ Section 214 of the Act is entitled "United States Policy with Respect to Jerusalem as the Capital of Israel."¹² It "contains four provisions related to the recognition of Jerusalem as Israel's capital."¹³ The first three provisions do not control the Executive's behavior,¹⁴ but the fourth provision does. Section 214(d) requires that, for United States citizens born in Jerusalem, the State Department "shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."¹⁵

When President Bush signed the 2003 Foreign Relations Authorization Act, he issued a signing statement challenging the constitutionality of certain sections of the statute.¹⁶ According to the President, section 214 "would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to . . . determine the terms on which recognition is given to foreign states."¹⁷ By requiring that the State Department, upon request of a passport applicant, "shall" list Israel as the place of birth of an American citizen born in Jerusalem, section 214(d) is clearly mandatory and not advisory.

Menachem Zivotofsky is a United States citizen born in Jerusalem in 2002.¹⁸ His

departments.").

8. *Zivotofsky*, 725 F.3d at 200.

9. *Id.*

10. 7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 1383.5-6 (2012).

11. Pub. L. No. 107-228, 116 Stat. 1350 (2002).

12. *Id.* § 214, 116 Stat. at 1365-66.

13. H.R. REP. NO. 107-671, at 123 (2002) (Conf. Rep.), *reprinted in* 2002 U.S.C.C.A.N. 869, 876. Members of Congress likewise stated that the statute was designed to carry out a policy of recognizing Jerusalem as the capital of Israel. *See Zivotofsky*, 725 F.3d at 225 (Tatel, J., concurring) ("The other sections under [Section 214] . . . are about recognizing Jerusalem as part of—indeed, as the capital of—Israel. And the legislative history makes doubly clear that recognition was Congress's goal." (citations omitted)).

14. Section 214(a) "urges" the President to relocate the American Embassy in Israel from Tel Aviv to Jerusalem. 116 Stat. at 1365. Section 214(b) prohibits the use of funds "appropriated by this Act" for the operation of a U.S. consulate in Jerusalem that is not under the supervision of the American Ambassador to Israel. 116 Stat. at 1365-66. And section 214(c) prohibits the use of funds "appropriated by this Act" to produce certain publications that do not list Jerusalem as the capital of Israel. 116 Stat. at 1366. Subsection (a) is clearly advisory, while (b) and (c) do not apply to other funding sources.

15. 116 Stat. at 1366.

16. Presidential Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1697 (Sept. 30, 2002).

17. *Id.* at 1698.

18. *Zivotofsky*, 725 F.3d at 203.

parents applied for a passport and requested that Menachem's place of birth be listed as "Israel."¹⁹ The State Department refused to comply with section 214(d), believing that it was unconstitutional and that its enforcement would adversely affect United States foreign policy in the Middle East.²⁰ Menachem's parents sued, and the case has gone up and down the ladders of the federal courts. Its latest iteration began when the Court of Appeals held that the case presented a nonjusticiable political question.²¹ The Supreme Court granted certiorari and directed the parties to address not only the political question issue but the merits as well: "Whether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns."²² After the parties briefed and argued both issues, the Supreme Court held that the case should not be dismissed as a political question.²³ As for the merits, the Court summarized the parties' arguments, stated that this was not a "simple" case, and remanded to the Court of Appeals.²⁴ The Court cautioned that "[r]esolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers."²⁵

In one of my earlier articles on recognition, I examined in detail the text of the Constitution and its original understanding and concluded that neither provided affirmative evidence that the Constitution vests a plenary recognition power in the President.²⁶ However, I was also unable to conclude that such a power was deliberately withheld.²⁷ The subject of how the United States would recognize new foreign states or

19. *Id.* His parents initially requested that Menachem's place of birth be listed as "Jerusalem, Israel," but changed that request to "Israel" in order to invoke the statute. *Id.*

20. *Id.* at 200, 217–18.

21. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1228 (D.C. Cir. 2009). Initially, the district court dismissed *Zivotofsky's* case for lack of standing and because it presented a political question. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, Nos. 03-1921, 03-2048, 2004 WL 5835212, at *3 (D.D.C. Sept. 7, 2004). The Court of Appeals reversed on standing. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 444 F.3d 614, 617 (D.C. Cir. 2006). The district court again dismissed the case as a political question. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 511 F. Supp. 2d 97, 107 (D.D.C. 2007).

22. *M.B.Z. ex rel. Zivotofsky v. Clinton*, 131 S. Ct. 2897, 2897 (2011).

23. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1425 (2012).

24. *Id.* at 1430–31.

25. *Id.* at 1430.

26. Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. RICH. L. REV. 801 (2011) [hereinafter Reinstein, *Recognition*]. In brief summary, recognition is not an explicit power of either Congress or the President. *Id.* at 807. A congressional power over recognition can be implied from the Article I powers to declare war, regulate foreign commerce, and enact necessary and proper legislation. *Id.* at 809 & n.48. An executive power over recognition can be implied from the provision in Article II that the President "shall" receive ambassadors and other public ministers and from the implied power of the President to conduct the nation's foreign affairs. *Id.* at 816, 843–44. A joint power of the President and Senate over recognition can be implied from the Article II treaty and diplomatic appointments powers. *Id.* at 805 n.27. As for the original understanding, the Receive Ambassadors Clause was almost entirely ignored, except for Publius's assertion that this was a ministerial duty that "is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government." *Id.* at 815 (quoting THE FEDERALIST NO. 69, at 419 (Alexander Hamilton) (Clinton Rossiter ed., 2003)). The Executive Vesting Clause was also largely ignored, and no one suggested that it was a source of plenary executive power over foreign affairs. *Id.* at 851–52.

27. *Id.* at 862.

governments did not arise in either the Constitutional Convention or in the debates over ratification.²⁸ As a new and vulnerable nation that had overthrown colonial and monarchical rule, the United States desperately needed to be recognized and accepted by the European nations.²⁹ The idea that the United States would need to recognize foreign states and governments was simply not a pressing issue or even something that would predictably occur.³⁰ The Court of Appeals adopted this explanation and concluded that the text and original understanding do not help resolve the source or scope of the recognition power.³¹

The Court of Appeals then held, for two reasons, that the President's recognition power was exclusive and that the passport statute unconstitutionally infringed on that power.³² As an inferior federal court, it was bound by the considered dicta of Supreme Court decisions, most of which placed the recognition power exclusively in the Executive.³³ This approach is consistent with the standard employed by the D.C. Circuit for interpreting the force of dicta in Supreme Court decisions.³⁴ The Court of Appeals also evaluated the post-ratification history and concluded that presidents consistently claimed and Congress consistently acknowledged that the recognition power was exclusively an executive prerogative.³⁵

Section II of this Article examines the post-ratification history. This is the first in-depth analysis of the historical relationship of the executive and legislative branches to the recognition power in almost a century.³⁶ That history is more complex and extensive than described by the Court of Appeals in *Zivotofsky*. I examine in detail the events from which the Court of Appeals concluded that the executive recognition power is exclusive—the recognition decisions of the Washington administration during the Neutrality Crisis in 1792–93; the disputes between Speaker of the House Henry Clay and the Monroe administration in 1818–21 over the recognition of the Latin American republics; President Jackson's 1836 decision to yield the initiative over recognizing the Republic of Texas to Congress; the 1862 recognition of Haiti and Liberia during the Lincoln administration; the 1864 dispute between the Lincoln administration and the House of Representatives concerning the nonrecognition of

28. *Id.* at 845, 860–61.

29. *Id.* at 861.

30. *Id.*

31. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 206–07 (D.C. Cir. 2013) (quoting Reinstein, *Recognition*, *supra* note 26, at 861).

32. *Id.* at 220.

33. *Id.* at 212.

34. *See, e.g.*, *United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006) (“[C]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.”) (quoting *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003)).

35. *Zivotofsky*, 725 F.3d at 207–10.

36. *See generally* JULIUS GOEBEL, JR., *THE RECOGNITION POWER OF THE UNITED STATES* (1915). I have written two articles that examine the recognition power, as part of larger studies of executive power, during the period covering the administrations of George Washington through John Quincy Adams. Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373 (2012) [hereinafter Reinstein, *Washington*]; Robert J. Reinstein, *Slavery, Executive Power and International Law: The Haitian Revolution and American Constitutionalism*, 53 AM. J. LEGAL HIST. 141 (2013) [hereinafter Reinstein, *Haiti*].

Maximilian as the ruler of Mexico; the conflict between the Senate, President McKinley, and the House over Cuban recognition in 1898 on the eve of the Spanish-American war; and the 1994 Taiwan passport statute (upon which the Jerusalem statute was modeled). I also examine important events that were not discussed by the Court of Appeals (or brought to its attention by the litigants)—the 1800 congressional legislation recognizing which country (France or Spain) had sovereignty over Santo Domingo during the Quasi War with France, the 1806 legislation denying Haitian independence and declaring that territory to still be a colony of France, and the 1979 Taiwan Relations Act and subsequent legislation concerning sovereignty over that island.

Section III of this Article evaluates the conclusions that can be drawn from the post-ratification history. That history establishes an authority in the President to recognize foreign states and governments but provides little support for any claim of an *exclusive* recognition power. The weight of the evidence contradicts such a claim of exclusive executive power, particularly because Congress has several times enacted legislation that either exercised the recognition power or determined the policies governing executive recognition decisions. On other occasions, there are plausible explanations for presidential and congressional actions and inactions other than claims or acknowledgements of exclusive executive power. However, the number of incidents involving the allocation of the recognition power is fairly small, and differing inferences can be drawn from the relevant historical events.

Post-ratification history is therefore not dispositive by itself. The legal significance of that history depends on the answers to certain fundamental questions: Does the Executive have the burden of proving that history provides substantial support for its claim of exclusive power, or does Congress have the burden of disproving that claim? What is the significance of presidential acquiescence in Congress's exercise of the recognition power? And of congressional acquiescence in the President's exercise of that power? Has Congress effectively acknowledged in the twentieth century, if not before, that the President's recognition power is exclusive? And how does one resolve the conflict between function, which supports executive authority, and constitutional structure, which disfavors uncheckable power in the President?

I address these questions through constitutional doctrine and normative values. My ultimate conclusion is that the post-ratification evidence does not support an exclusive recognition power in the Executive. On the contrary, I argue that even if the post-ratification evidence were more ambiguous than it is, the Executive's power should be subject to the ultimate legislative authority of Congress. First principles confirm that legislation enacted pursuant to the constitutional powers of Congress controls the Executive's implied recognition authority.³⁷

37. I do not deal with Congress's authority over passports because I agree with Judge Tatel's analysis of the issue in the case: "It is beyond dispute that Congress's immigration, foreign commerce, and naturalization powers authorize it to regulate passports. . . . Congress has authority to regulate passports; we need only decide whether this particular exercise of that authority, Section 214(d), infringes on the Executive's recognition power." *Zivotofsky*, 725 F.3d at 221 (Tatel, J., concurring).

II. POST-RATIFICATION HISTORY

A. *Washington: The Neutrality Crisis*

The issue of executive authority to recognize a foreign government first arose in the Washington administration during the Neutrality Crisis. In *Zivotofsky*, the Court of Appeals asserted that President Washington believed that he had the exclusive power to recognize foreign nations and governments.³⁸ The historical analysis that follows shows that this conclusion is incorrect. Washington did set a precedent in recognizing a foreign government, but he made no claim of exclusive power—nor could he, given his reliance on the law of nations as the source of his authority.

Relying on an excellent but controversial article by Saikrishna Prakash and Michael Ramsey,³⁹ the Court of Appeals stated that (i) Washington's cabinet unanimously decided that the President could receive the minister of France's revolutionary government (Edmond Genêt) without consulting Congress, even though that would constitute recognition of that government; (ii) Congress never tried to tell Washington which nations and governments to recognize; and (iii) the President took sole control over issuing exequaturs to foreign consuls.⁴⁰

The latter two points are relatively insubstantial because of the United States' then marginal position in the world. To European governments, the United States was an outlier with dubious legitimacy and longevity. European recognition of the United States was of incalculable value to the new republic, as it would lead to diplomatic relations, commercial treaties, and acceptance into the Western community of nations. But the idea that European nations needed recognition by the United States is fanciful. Thus, except for the French revolutionary governments, discussed below, no nation or government sought recognition from the United States during the Washington administration.⁴¹ With no other potential recognition or nonrecognition decision, the issue simply did not arise in Congress or the executive branch.⁴² As for exequaturs (licenses to foreign consuls allowing them to represent their countries in the United States),⁴³ issuing one to a consul could have been a method of recognition,⁴⁴ had the

38. *Id.* at 207.

39. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001). The authors argue for a residual and absolute power in the President over foreign affairs, subject only to explicit limitations in the Constitution. *Id.* at 234–35. The leading rebuttal is Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004), in which the authors argue that both the text of the Constitution and history provide support for a much more limited presidential power over foreign affairs.

40. *Zivotofsky*, 725 F.3d at 208.

41. See Reinstein, *Washington*, *supra* note 36, at 421–24 (discussing the Washington administration's recognition of the French revolutionary governments); Reinstein, *Recognition*, *supra* note 26, at 861 (noting that United States recognition of European nations "was a nonsequitur" since those nations had existed for centuries and mutually recognized one another).

42. Reinstein, *Recognition*, *supra* note 26, at 861 ("As an example, consider the Treaty of Peace. In article I of that treaty, King George III, on behalf of Great Britain, recognized the independence of the United States. Suppose that the American commissioners had proposed, for article II, that the United States recognized the independence of Great Britain and George III as that country's head of government. That would have been, well, laughable.")

43. Prakash & Ramsey, *supra* note 39, at 313.

United States “recognition” of existing European nations been a realistic concept. In any event, it appears that all foreign consuls who sought and received exequaturs during the Washington administration represented countries with which the United States had diplomatic relations or treaties.⁴⁵ Issuing exequaturs to foreign consuls were thus ministerial actions of the Executive.

The first point, relating to the receipt of Genêt and recognition of the French revolutionary government, requires more examination because it presented the question of whether the United States would recognize a new government whose legitimacy was denied by the European nations. In August 1792, Louis XVI was suspended and a new revolutionary government began to be formed.⁴⁶ All European countries withdrew their foreign ministers from Paris, and the United States minister, Gouverneur Morris, terminated diplomatic relations and sought directions from Secretary of State Thomas Jefferson.⁴⁷ When Washington was satisfied that the revolutionary National Convention had been formed with full powers to transact the affairs of the nation, Jefferson directed Morris to consider “the Convention, or the government they shall have established as the lawful representatives of the nation, and authorised to act for them.”⁴⁸

The recognition issue came up again following the execution of Louis XVI in February 1793, the resulting wars between France and a coalition led by Great Britain, and the formation of a new National Convention. Morris again terminated diplomatic relations pending the establishment of a new government.⁴⁹ At Washington’s direction,

44. Reinstein, *Recognition*, *supra* note 26, at 811.

45. There is apparently no published compilation of foreign consuls serving in the United States during the Washington administration. There is, however, a folio of original (handwritten) letters from foreign consuls to the Secretary of State that was kindly made available to me by Anne-Marie Carstens, a State Department historian. NOTES FROM FOREIGN CONSULS IN THE UNITED STATES TO THE DEPARTMENT OF STATE, 1789–1906 (National Archives, 1966). I also searched the Washington and Jefferson papers. These sources disclosed consuls who represented France, the Netherlands, Great Britain, Prussia, Spain, Portugal, and Sweden during the Washington administration. Each of these countries had treaties, diplomatic relations, or both with the United States. *See* Treaty of Amity and Commerce, U.S.-Prussia, July–Sept. 1785, 8 Stat. 84 (Prussia); Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80 (Great Britain); Treaty of Amity and Commerce, U.S.-Swed., Apr. 3, 1783, 8 Stat. 60 (Sweden); Treaty of Amity and Commerce, U.S.-Neth., Oct. 8, 1782, 8 Stat. 32 (Netherlands); Treaty of Amity and Commerce, U.S.-Fr., Feb. 6, 1778, 8 Stat. 12 (France); S. EXEC. JOURNAL, 1st Cong., 3rd Sess. 75 (1791) (approving appointment of David Humphreys as Minister resident to Portugal); S. EXEC. JOURNAL, 1st Cong., 1st Sess. 33–34 (1789) (approving appointment of William Carmichael as Chargé des Affaires to Spain).

46. Letter from Gouverneur Morris to Thomas Jefferson (Aug. 1, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON 275, 276 (John Catanzariti ed., 1990).

47. *See* Letter from Gouverneur Morris to Thomas Jefferson (Aug. 16, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 46, at 301, 305 (“[P]ermit me dear Sir to request the orders of the President respecting my Line of Conduct in the Circumstances about to arise.”); Letter from Gouverneur Morris to Thomas Jefferson (Aug. 22, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 46, at 313, 314 (“[I]f I stay I shall be alone.”).

48. Letter from Thomas Jefferson to Gouverneur Morris (Dec. 30, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 46, at 800, 800. For Washington’s decision to recognize the government, *see* Notes of a Conversation with George Washington on French Affairs (Dec. 27, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 46, at 793, 793.

49. Letter from Thomas Jefferson to Gouverneur Morris (Mar. 12, 1793), *in* 25 THE PAPERS OF THOMAS JEFFERSON 367, 367–68 (John Catanzariti ed., 1992).

Jefferson instructed Morris on March 12, 1793, to resume diplomatic relations with the new National Convention as the government of France.⁵⁰ Following this recognition, the cabinet voted on March 30, 1793, and Washington agreed, to receive the revolutionary government's foreign minister.⁵¹

The Receive Ambassadors Clause was not Washington's source of authority for recognizing the French revolutionary governments; those recognitions *preceded* the decision to receive Genêt.⁵² Washington turned to the law of nations for guidance and authority on recognition and other difficult and unexpected questions of how to maintain American neutrality in the European war.⁵³ As I have explained elsewhere, Washington's unilateral actions during the Neutrality Crisis—including his issuing the Neutrality Proclamation, authorizing the prosecution of Americans who provided military support for a belligerent, deciding that the United States remained bound by the Revolutionary War era treaties with France, recognizing the French revolutionary governments, receiving Genêt, and promulgating rules for the conduct of the belligerents in American territory—were based on two principles: the Executive had the duty and resulting power to execute the laws, and the law of nations was a self-executing part of the law of the land.⁵⁴

The Washington administration consulted the treatises of Continental publicists,⁵⁵ most notably Emmerich de Vattel,⁵⁶ to determine the content of the law of nations. In particular, the administration adopted Vattel's doctrine of *de facto* recognition—that every government had the duty to recognize and receive foreign ministers from any government that was in “actual possession” of the instruments of national power.⁵⁷ Thus, Jefferson's letter recognizing the French revolutionary government stated:

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

50. *Id.* at 367.

51. Notes on the Reception of Edmond Charles Genet (Mar. 30, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 49, at 469, 469–70.

52. Reinstein, *Washington*, *supra* note 36, at 422–24.

53. *Id.* at 379.

54. *Id.* at 375–79. The leading work on the incorporation of the law of nations into the law of the land in the early Republic is Edwin D. Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L L. 239 (1932). On the importance of the law of nations to the early Republic, see David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010).

55. Reinstein, *Washington*, *supra* note 36, at 398–409.

56. EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758).

57. Reinstein, *Washington*, *supra* note 36, at 424; see also David Gray Adler, *The President's Recognition Power*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 133, 138–49 (David Gray Adler & Larry N. George eds., 1996) (describing the use of Vattel's treatise as authoritative on the law of nations by many of the founders and arguing that Washington adopted Vattel's doctrine of *de facto* recognition).

to be regarded.⁵⁸

Secretary of the Treasury Alexander Hamilton had initially voted to receive Genêt but reconsidered because he was concerned that receiving Genêt without qualification would be seen as ratifying the continued validity of the Revolutionary War era treaties with France.⁵⁹ Hamilton consulted Chief Justice John Jay,⁶⁰ but Jay responded that the United States was bound under the law of nations to recognize the revolutionary government of France and to receive its designated minister.⁶¹ Hamilton conceded on receiving Genêt but argued strenuously (and unsuccessfully) that the treaties were no longer in force.⁶²

Because Washington's recognition of the revolutionary governments and his receipt of Genêt were based on the Executive's authority to enforce the law of nations, that could not establish a precedent for an *exclusive* recognition power in the Executive. Washington never claimed that any executive power to enforce the law of nations was superior to the legislative powers of Congress. Nor could he. The principal example is the Neutrality Proclamation itself, which Washington had issued when Congress was not in session.⁶³ The Proclamation was based on the fact that the United States was at peace with all of the belligerents, and it adopted Vattel's law of neutrality—that "the duty and interest of the United States require, that they should with sincerity . . . adopt a conduct friendly and impartial toward the belligerent powers."⁶⁴ When Congress

58. Letter from Thomas Jefferson to Gouverneur Morris (Mar. 12, 1793), *supra* note 49, at 367. Jefferson used virtually identical language in a letter to Thomas Pinckney, the United States Minister to Great Britain, explaining the recognition of the predecessor revolutionary French government. Letter from Thomas Jefferson to Thomas Pinckney (Dec. 30, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 46, at 803. For Washington's preapproval, see Letter from George Washington to Thomas Jefferson (Dec. 30, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 46, at 802, 804.

59. See Reinstein, *Washington*, *supra* note 36, at 425–26 (noting that receiving Genêt was a "hard pill for Hamilton").

60. Letter from Alexander Hamilton to John Jay (Apr. 9, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON 297, 297–98 (Harold C. Syrett ed., 1969).

61. Letter from John Jay to Alexander Hamilton (Apr. 11, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 60, at 307, 307–10. At Hamilton's request, Jay drafted a Neutrality Proclamation. *Id.* at 308–10. Jay's draft stated that the present government of France must be recognized as the lawful government and that foreign ministers must be exchanged for diplomatic intercourse. See *id.* at 309 ([T]hey who [a]ctually administer the government. of any nation, are by foreign nation [to] be regarded as its *lawful Rulers* . . . "[I]t is no less [the] Duty than the Interest of the United States, strictly to observe th[at] conduct towards all nations, which the Laws of nations prescr[i]be.)" (alterations in original)). Similarly, quoting extensively from Vattel, Attorney General Edmund Randolph advised Washington that the United States was legally required to receive Genêt without qualification. Letter from Edmund Randolph to George Washington (May 6, 1793), in 12 THE PAPERS OF GEORGE WASHINGTON 534, 537–38 (Christine Sternberg Patrick & John C. Pinheiro eds., 2005).

62. For Hamilton's argument, based on Vattel, that the French change of government made the treaties voidable, see Letter from Alexander Hamilton and Henry Knox to George Washington (May 2, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 60, at 367, 367–96. For Jefferson's defense of the continued validity of the treaties, relying on Vattel and other publicists, see Opinion on the Treaties with France (Apr. 28, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 49, at 608, 608–18. For Randolph's support of the continuing validity of the treaties, relying on Vattel, see Letter from Edmund Randolph to George Washington (May 6, 1793), *supra* note 61, at 534–47. For an analysis of this debate, see Reinstein, *Washington*, *supra* note 36, at 410–17.

63. See Reinstein, *Washington*, *supra* note 36, at 429 (noting that because Congress had left the country in a state of peace, Washington and his Cabinet believed it was the Executive's duty to preserve the same).

64. Neutrality Proclamation (Apr. 22, 1793), *reprinted* in 12 THE PAPERS OF GEORGE WASHINGTON,

reconvened in December 1793, it could have departed from neutrality, either by declaring war on a belligerent or by favoring a belligerent militarily or commercially. Congress in fact did neither; pursuant to its war powers, it enacted Washington's neutrality position into positive law in the Neutrality Act of 1794.⁶⁵ And Washington twice sought and obtained authority by statute or treaty to accomplish objectives that appeared unobtainable under the law of nations.⁶⁶ Washington understood that he was

supra note 61, at 472, 472–73. “[F]riend[ly]” and “impartial” are Vattel’s keynote words for strict neutrality. VATTEL, *supra* note 56, at 268.

65. Neutrality Act of June 5, 1794, ch. 50, 1 Stat. 381. On the war powers as the constitutional foundation of the Neutrality Act, see Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution’s Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1711–12 (2012), and Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT’L L.J. 1, 27–33 (1983).

66. The Neutrality Act solved what had become a difficult problem for the Executive. Again borrowing from Vattel, the Neutrality Proclamation had warned Americans to remain neutral in the conflict between France and Great Britain and that violators would be subject to punishments or forfeitures under the law of nations. Neutrality Proclamation (Apr. 22, 1793), *supra* note 64, at 472–73. For Vattel’s position, see Reinstein, *Washington*, *supra* note 36, at 430–31. The Executive subsequently brought criminal prosecutions against Americans who gave military support to France. *See, e.g., id.* at 434 (noting that with Washington’s approval, Thomas Jefferson instructed William Rawle, the United States Attorney, to prosecute individuals as violators of the law of nations if they were discovered to be aiding any of the belligerents). Three Justices of the Supreme Court, sitting on circuit, instructed grand and petit juries that such prosecutions were valid exercises of the government’s duty to enforce the law of nations. Justice Wilson’s Charge to the Jury, *Henfield’s Case*, 11 F. Cas. 1099, 1119–22 (C.C.D. Pa. 1793) (No. 6,360) (Iredell, J., and Peters, J., concurring); Chief Justice Jay’s Charge to the Grand Jury for the District of Virginia (May 22, 1793), *reprinted in id.* at 1102–03. But juries acquitted Americans who had violated neutrality by providing military assistance to France. The juries may have acted out of pro-French bias, which was Hamilton’s opinion, *see* Letter from Alexander Hamilton to George Washington (Aug. 5, 1793), in 15 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 60, at 194, 194, or the fear of government by executive decree, which was John Marshall’s opinion, *see* JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 389–90 (Robert Faulkner & Paul Carrese eds., Liberty Fund, Inc., 2000) (1838). Washington asked Congress to include these prohibitions as crimes in the Neutrality Act, and Congress did so. Act of June 5, 1794, ch. 50, 1 Stat. 381; Speech of the President of the United States to Both Houses of Congress (Dec. 3, 1793), in 1 STATE PAPERS AND PUBLIC DOCUMENTS OF THE UNITED STATES FROM THE ACCESSION OF GEORGE WASHINGTON TO THE PRESIDENCY, EXHIBITING A COMPLETE VIEW OF OUR FOREIGN RELATIONS SINCE THAT TIME 39, 39–40 (2d ed., 1817); David P. Currie, *The Constitution in Congress: The Third Congress, 1793–1795*, 63 U. CHI. L. REV. 1, 14–16 (1996).

The other example illustrating the relation of legislative and executive powers during the Neutrality Crisis concerned French privateering. The United States treaty with France prohibited the enemies of France from selling their prizes in the United States. Treaty of Amity and Commerce, U.S.-Fr., *supra* note 45, art. 17. But there was no treaty prohibiting France from selling captured British ships as prizes, and Great Britain bitterly protested this practice by French-commissioned privateers as inconsistent with the United States’ duty of neutrality. Washington wanted to stop this provocative French irritant. But the administration decided that the Executive did not have that power under the law of nations, *see* Letter from Edmund Randolph to George Hammond (June 2, 1794), in 1 AMERICAN STATE PAPERS 464, 465 (William S. Hein & Co., Inc., 1998) (1833), and that “no power less than that of the legislature can prohibit” the sales of prizes by French-commissioned privateers, *see* Cabinet Memorandum on French Privateers (June 1, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, 155, 156 (John Catanzariti ed., 1995). Washington asked Congress to include the necessary prohibitory legislation in the Neutrality Act, but the administration’s measure was defeated in the House after passing the Senate. CHARLES S. HYNEMAN, THE FIRST AMERICAN NEUTRALITY 122–23 (William S. Hein & Co., Inc., 2002) (1934). At Washington’s direction, John Jay then negotiated the prohibition of French prize sales in the United States in the treaty with Great Britain that bears Jay’s name. Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, art. 24, 8 Stat. 116; STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800, at 395–97 (1993); Letter from Alexander

exercising power that was concurrent with, and ultimately subordinate to, the will of Congress.

Washington established an important precedent for the Executive's authority to recognize new foreign states and governments. However, this history does not support the more far-reaching precedent of an executive recognition power that is exclusive of Congress.⁶⁷ The opposite is true: as with all other actions to enforce the law of nations, executive power was shared with, and ultimately subordinate to, the legislative authority of Congress.

B. Adams and Jefferson: Santo Domingo and St. Domingue/Haiti

The recognition of foreign states and governments again arose during the administrations of John Adams and Thomas Jefferson. Congress twice exercised the recognition power by enacting legislation that resolved the contested legal status of the two portions of the island of Hispaniola. In 1800, during the Quasi War with France, Congress resolved contested sovereignty between France and Spain over Santo Domingo. And in 1806, Congress renounced the independence of the newly formed nation of Haiti and declared that portion of Hispaniola to be a colony of France.⁶⁸

1. The 1800 Legislation

During the Quasi War with France, Congress exercised its war and foreign commerce powers and declared that Santo Domingo was a colony of France.⁶⁹ Hispaniola was then divided into two colonies.⁷⁰ The western portion was the French colony of St. Domingue (now Haiti), which was under the autonomous control of an insurgent government headed by Toussaint Louverture.⁷¹ The eastern portion was Santo Domingo (now the Dominican Republic), historically a Spanish colony, whose legal status was in doubt.⁷² When Spain withdrew from the war against France in 1795, the treaty between the two countries provided for the cession of Santo Domingo to France.⁷³ However, that provision of the treaty was not implemented during the Quasi War, and Spain continued to govern the eastern portion of Hispaniola.⁷⁴

Hamilton to John Jay (June 4, 1794), in 16 THE PAPERS OF ALEXANDER HAMILTON 456, 456–57 (Harold C. Syrett ed., 1972). The Executive thereby obtained authority through the treaty power that it did not possess under the law of nations.

67. On the importance of the law of nations to Washington's and subsequent presidential recognition decisions, see Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987 (2013).

68. These enactments were not discussed by the Court of Appeals in *Zivotofsky* or brought to its attention by the parties or amici. I examined these and other matters of executive and legislative power arising out of the Haitian Revolution in an article that was published after *Zivotofsky* was argued. See generally Reinstein, *Haiti*, *supra* note 36.

69. *Id.* at 161–65.

70. *Id.* at 159.

71. *Id.*

72. *Id.*

73. LAURENT DUBOIS, AVENGERS OF THE NEW WORLD: THE STORY OF THE HAITIAN REVOLUTION 183 (2004); THOMAS O. OTT, THE HAITIAN REVOLUTION 1789–1804, at 86 (1973).

74. DUBOIS, *supra* note 73, at 183.

In 1798, Congress enacted non-intercourse laws that prohibited Americans from trading with France or any of its territories.⁷⁵ To support Louverture and resume commerce with St. Domingue, Congress reenacted the non-intercourse law with “Toussaint’s Clause” in 1799,⁷⁶ a provision that allowed the President to lift the prohibition for any French territory “with which a commercial intercourse may safely be renewed.”⁷⁷ President Adams opened trade with ports of St. Domingue under Louverture’s control,⁷⁸ and Louverture entered into a secret alliance with the United States and Great Britain against France, while continuing to swear fealty to France.⁷⁹

Louverture also controlled ports that he had seized in Santo Domingo. But was Santo Domingo a territory of France and thus subject to the non-intercourse law with “Toussaint’s Clause”? If recognition were understood as exclusively an executive power, the status of Santo Domingo was a matter for the President to decide. However, the recognition decision was made by Congress, with a provision in the 1800 renewal of the non-intercourse law declaring: “That the whole of the island of Hispaniola shall for the purposes of this act be considered as a dependency of the French Republic.”⁸⁰ This declaration of French sovereignty authorized President Adams to invoke “Toussaint’s Clause” not just over St. Domingue but also over the ports of Santo Domingo controlled by Louverture.

The 1800 law declaring Santo Domingo subject to French sovereignty was the first congressional act of recognition. It was a war measure that lapsed with the end of the Quasi War. The statute did not affect the western portion of Hispaniola because Louverture ruled St. Domingue as a French colony. After independence was declared, Congress would twice exercise a recognition power over Haiti—first in 1806 by denying Haitian independence from France, then in 1862 by recognizing Haiti as an independent nation.⁸¹

2. The Haitian Non-Intercourse Law

In 1806, Congress enacted legislation that renounced Haiti’s claim to independence and, in the words of Supreme Court Justice Bushrod Washington, was “a clear acknowledgment of the sovereignty of France over the island.”⁸²

The January 1, 1804, Haitian declaration of independence from France culminated a thirteen-year struggle in which the blacks of St. Domingue secured their freedom in the only permanently successful slave revolt in the Western Hemisphere and then

75. Act of June 13, 1798, ch. 53, 1 Stat. 565, 565.

76. GORDON S. BROWN, *TOUSSAINT’S CLAUSE: THE FOUNDING FATHERS AND THE HAITIAN REVOLUTION* 138 (2005).

77. Act of Feb 9, 1799, ch. 2, § 4, 1 Stat. 613, 615.

78. John Adams, A Proclamation (June 26, 1799), in 1 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1908*, at 288, 288 (James D. Richardson ed., 1897) [hereinafter *MESSAGES AND PAPERS*].

79. Reinstein, *Haiti*, *supra* note 36, at 168–71.

80. Act of Feb. 27, 1800, ch. 10, § 7, 2 Stat. 7, 10.

81. See *infra* Part II.C.2 for a discussion of the 1806 legislation that renounced Haiti’s claim to independence and *infra* Part II.E.1 for a discussion of the 1862 recognition of Haiti.

82. *Clark v. United States*, 5 F. Cas. 932, 934 (C.C.D. Pa. 1811) (No. 2,838).

successively defeated the invading armies of Great Britain, Spain, and France.⁸³ In 1802–03, the Haitians had destroyed a huge French invasion army that had been sent by First Consul Napoleon Bonaparte to regain control over the island.⁸⁴ However, the civil war between Haiti and France did not end. France continued to claim full sovereignty over the island;⁸⁵ French forces, operating out of a base in Santo Domingo, attacked Haiti and seized American ships that were trading with the Haitians;⁸⁶ Bonaparte threatened another invasion;⁸⁷ and the Haitians themselves expected a reinvasion.⁸⁸

The Jefferson administration's policy following the declaration of Haitian independence was as follows: (i) the United States would continue to recognize French sovereignty over St. Domingue, (ii) the United States would not recognize any independent rights of Haiti, and (iii) American commerce with the Haitians would continue with the administration doing nothing to interrupt that trade.⁸⁹ Although termed a policy of neutrality, the recognition of French sovereignty violated the law of nations because, in a civil war, the duty of a neutral was to afford each side equal belligerent rights and recognize sovereignty in neither.⁹⁰

France complained that American trade with Haiti violated French sovereignty over the island and demanded that the United States prohibit all trade with Haiti.⁹¹ French protests, including a personal one from Bonaparte, became increasingly threatening. The administration tried unsuccessfully to negotiate a treaty with France that would prohibit trade in contraband but allow ordinary trade.⁹² Congress then intervened. On December 20, 1805, Senator George Logan, an antislavery pacifist, introduced a bill to prohibit all American trade with Haiti.⁹³ Federalists protested that the United States should not yield to French bullying and that the bill violated the law of neutrality governing civil wars.⁹⁴ But Logan's bill provided proslavery Republicans with a perfect opportunity to make Haiti illegitimate, and they took full advantage of

83. The leading work on the Haitian revolution is DUBOIS, *supra* note 73.

84. See generally PHILIPPE R. GIRARD, *THE SLAVES WHO DEFEATED NAPOLEON* (2011).

85. See TIM MATTHEWSON, *A PROSLAVERY FOREIGN POLICY: HAITIAN-AMERICAN RELATIONS DURING THE EARLY REPUBLIC* 121 (2003) (“[Bonaparte] never considered abandoning the island and was contemptuous of proposals even suggesting the termination of French sovereignty.”).

86. BROWN, *supra* note 76, at 230–31; MATTHEWSON, *supra* note 85, at 120–21.

87. Letter from U.S. Minister Robert R. Livingston to Secretary of State James Madison (May 3, 1804), in 7 *THE PAPERS OF JAMES MADISON* 131, 136 (David B. Mattern et al. eds., 2005) (reporting that Bonaparte “still expect[s] to reconquer the Island in case either of peace or a successful enterprize against England”).

88. Julia Gaffield, “So Many Schemes in Agitation”: The Haitian State and the Atlantic World 7–10 (2012) (unpublished Ph.D. dissertation, Duke University) (on file with Duke University Libraries).

89. Letter from Secretary of State James Madison to U.S. Minister Robert R. Livingston (Jan. 31, 1804), in 6 *THE PAPERS OF JAMES MADISON* 406, 411 (Mary A. Hackett ed., 2002).

90. See *infra* Part II.C for a discussion of President Monroe's correct application of the laws of neutrality in the civil war between the Latin American provinces and Spain.

91. See Reinstein, *Haiti*, *supra* note 36, at 202–05, for a discussion of the French demands for a total cessation of American trade with Haiti.

92. *Id.* at 203–04.

93. 15 *ANNALS OF CONG.* 26–27 (1805).

94. See especially the passionate speech by Senator Samuel White. *Id.* at 117–38.

it.⁹⁵ To Southern members of Congress, either Haiti was independent or it was still St. Domingue, a colony of France, and they demanded that Congress treat it as the latter.⁹⁶ As Henry Adams concluded, Logan's bill was hijacked by a racist agenda "to declare the [N]egroes of Hayti enemies of the human race."⁹⁷ As enacted, the 1806 Haitian non-intercourse act provided that:

[A]ll commercial intercourse between any person or persons resident within the United States, and any person or persons resident *within any part of the island of St. Domingo, not in possession, and under the acknowledged government of France*, shall be, and is hereby prohibited.⁹⁸

In 1807, the Haitian non-intercourse statute was reenacted for one more year and was then allowed to lapse⁹⁹ because later that year Congress imposed a general embargo on all foreign trade.¹⁰⁰ In 1809, Congress replaced the general embargo with a non-intercourse law that applied to Great Britain, France, and their colonies and dependencies.¹⁰¹

*Clark v. United States*¹⁰² involved a merchant whose goods were seized in October 1809 because they were imported from Haiti.¹⁰³ The issue was whether, under the 1809 non-intercourse law, Haiti was still St. Domingue, a colony of France.¹⁰⁴ Invoking Vattel's doctrine of de facto sovereignty, Clark argued that the non-intercourse law did not apply because Haiti was independent of France under the law of nations.¹⁰⁵ Justice Bushrod Washington, sitting on circuit, stated that he was persuaded that Vattel's doctrine was the correct rule of decision for the courts and that Haiti had achieved independence in fact.¹⁰⁶ However, Justice Washington considered himself

95. Reinstein, *Haiti*, *supra* note 36, at 208.

96. *See, e.g.*, 15 ANNALS OF CONG. 37–38 (statement of Sen. James Jackson) (supporting trade with Haiti is the same as supporting a slave revolt in the South); *id.* at 498 (statement of Rep. Joseph Nicholson) (trade with Haiti means that the United States supports slave revolts); *id.* at 512 (statement of Rep. John Smilie) (the choice is either to prohibit the trade or recognize Haitian independence); *id.* (statement of Rep. Joseph Clay) (the United States cannot trade with Haitians without recognizing their independence, which would be "a sacrifice on the altar of black despotism and usurpation"); *id.* at 515 (statement of Rep. John Eppes) (the idea of Haitian independence is a "detestation"); *id.* (statement of Rep. Smilie) ("I deny that the inhabitants of St. Domingo are a nation.").

97. HENRY ADAMS, 2 HISTORY OF THE UNITED STATES OF AMERICA DURING THE FIRST ADMINISTRATION OF THOMAS JEFFERSON 142 (1889). Albert Gallatin, who was then the secretary of the treasury, later admitted to John Quincy Adams that Southern hostility towards Haiti was a "principal motive[]" of the legislation. Tim Matthewson, *Jefferson and the Nonrecognition of Haiti*, 140 PROCEEDINGS AM. PHIL. SOC'Y 22, 34 (1996).

98. Act of Feb. 28, 1806, ch. 9, § 1, 2 Stat. 351, 351 (emphasis added).

99. Act of Feb. 24, 1807, ch. 17, § 1, 2 Stat. 421, 421–22.

100. Act of Dec. 22, 1807, ch. 5, 2 Stat. 451, 451–52.

101. Act of Mar. 1, 1809, ch. 24, 2 Stat. 528, 528–33.

102. 5 F. Cas. 932 (C.C.D. Pa. 1811) (No. 2,838).

103. *Clark*, 5 F. Cas. at 932–33.

104. *Id.*

105. *Id.*

106. *See id.* at 933 ("These arguments, on the side of the appellants, had great weight with us, when they were urged; and we must candidly confess, that they lost nothing by the examination which we have given the subject during the vacation.").

bound by the Supreme Court's decision in *Rose v. Himely*.¹⁰⁷ In that case, Chief Justice Marshall did not dispute that Vattel stated the correct doctrine under the law of nations.¹⁰⁸ But Marshall stated that recognition was a decision for governments and not courts.¹⁰⁹ According to Marshall, the courts must treat St. Domingue as a colony of France until either France or the United States Government recognized Haitian independence.¹¹⁰ In *Clark*, Justice Washington therefore examined how the Government regarded the island:

When the [Haitian] non-intercourse law passed, in February 1806, the island of St. Domingo was in a state of open public war with France; having declared herself independent, framed a constitution of government, and shown herself able to maintain that independence. As an independent nation, the United States had an unquestionable right to carry on a commercial intercourse with that island. . . . [T]he law of 1806, was passed in consequence of a remonstrance of the French government, made upon that of the United States, through her minister. The United States were at liberty to acknowledge the independence of St. Domingo, and to treat her as a sovereign power, or to refuse such acknowledgment, and to consider her as a colony and dependence of France. *We view the law of 1806, under the circumstances which produced it, as a clear acknowledgment of the sovereignty of France over the island, which no subsequent act of our government, has in any respect impaired. . . . So that the government has not only not acknowledged the independence of this island, but has very plainly declared the contrary.*¹¹¹

The legislative determination that Haiti was still St. Domingue, a colony of France, was the same as Jefferson's executive determination. However, the Haitian non-intercourse law was an independent act of Congress, Jefferson's policy was not even mentioned in the debates, and the law was contrary to the President's policy on trade. Notably, Justice Washington did not examine executive decisions in determining the legal status of Haiti. Instead, he relied upon, and considered himself bound by, congressional legislation.¹¹²

As a matter of legislative purpose and operation, Justice Washington was clearly correct that the 1806 Haitian non-intercourse statute recognized continued French sovereignty over Haiti. This statute was disgracefully propelled by racism, but it was nevertheless an important legislative act of recognition in the Republic's early history.

107. *Id.* (citing *Rose v. Himley*, 8 U.S. (4 Cranch) 241 (1808)).

108. *Rose*, 8 U.S. at 272.

109. *Id.*

110. *Id.*

111. *Clark*, 5 F. Cas. at 934 (emphasis added).

112. *See id.* at 933 (indicating the primacy of congressional legislation by stating that "[t]he court is called upon to construe an act of congress, and to say, whether, within the meaning of the legislature, this island was to be considered as a dependence of France").

C. *Monroe: The Latin American Republics*

1. Clay's First Motion: International Relations, Law, and Politics

In 1818, a dispute arose in Congress between Speaker of the House Henry Clay and the administration of President James Monroe over whether the United States should recognize the insurgent provinces of Latin America as independent of Spanish rule. Clay's attempts to force recognition through legislation were successfully resisted by Monroe's supporters in Congress. In *Zivotofsky*, the Court of Appeals interpreted these events as confirming a congressional understanding that recognition was exclusively an executive function. A detailed examination of this dispute shows that nonconstitutional reasons of foreign policy, international law, and partisan politics probably were the strongest factors that caused Clay's defeat.

On March 24, 1818, Clay gave a major address in the House about the revolution in Spain's Latin American provinces.¹¹³ He introduced a motion for legislation to provide:

For one year's salary, and an outfit to a Minister to the United Provinces of the Rio de la Plata [the Argentine], the salary to commence, and the outfit to be paid whenever the President shall deem it expedient to send a Minister to the said United Provinces, a sum not exceeding eighteen thousand dollars.¹¹⁴

Clay acknowledged that the appointment of a foreign minister was a discretionary constitutional prerogative of the President and Senate.¹¹⁵ But his motion, if enacted as legislation, would have constituted recognition of the United Provinces as an independent state (Congress would not appropriate funds to send a foreign minister as an American diplomatic representative to a colony).¹¹⁶ Every member of the House who spoke during the debate understood the motion to constitute recognition.¹¹⁷ Clay asserted that the consistent policy of the United States was *de facto* recognition¹¹⁸ and that the United Provinces was entitled to recognition because it had secured its independence from Spain through a successful military insurgency and had established a functioning government.¹¹⁹ He argued that both Congress and the President had the implied constitutional powers to recognize new states and that Congress should exercise that power now.¹²⁰ Clay's motion was opposed by the Monroe administration

113. 32 ANNALS OF CONG. 1474–1500 (1818) (statement of Rep. Henry Clay).

114. *Id.* at 1500.

115. *Id.* at 1498–99.

116. *Id.* at 1498–1500. The United Provinces had declared independence in 1816.

117. See *infra* notes 137–54 and accompanying text for a discussion of the statements of various members of the House on the issue, all of which treated the motion as constituting recognition.

118. 32 ANNALS OF CONG. 1488–89.

119. *Id.* at 1489–91.

120. *Id.* at 1498–1500. Clay held to the theory of concurrent recognition powers in the legislative and executive branches even after serving as President John Quincy Adams's Secretary of State. During the Texas controversy, Clay reiterated that recognition could be effected by Congress alone through legislation regulating foreign commerce, or by the President and Senate through treaties and diplomatic appointments, or by the President alone through receiving foreign diplomats. GOEBEL, *supra* note 36, at 150.

and was resoundingly defeated by a vote of 45–115.¹²¹

The distinguished legal historian Julius Goebel, Jr., maintained that Clay's motion failed because the House determined that it "interfere[ed] with the functions of the executive."¹²² In *Zivotofsky*, the Court of Appeals adopted Goebel's explanation for Clay's defeat, as well as Goebel's conclusion that the outcome was a "direct confirmation of [the executive's] ultimate right to determine whether a government was to be recognized."¹²³ However, two Pulitzer Prize winning historians who studied this incident—Frederic Paxson and Samuel Flagg Bemis—attributed Clay's defeat to reasons of foreign policy and partisan politics.¹²⁴ And Goebel himself offered a political, nonconstitutional explanation in his concluding comments about this event.¹²⁵

The historical circumstances surrounding the debate on Clay's motion are briefly as follows. The revolutions against colonial rule in Latin America had swept through all of Spain's provinces on the continent and were widely supported by the American public, with many Americans idealizing them as replicating their own War of Independence.¹²⁶ President Monroe, who was sympathetic to the revolutionary cause, initially doubted that he had the authority to recognize the provinces.¹²⁷ Because the insurgency had risen to the level of a civil war, Monroe's policy, as required by the law of nations, was neutrality: Spain and the insurgent governments were recognized as having equal belligerent rights, and neither was recognized as having sovereignty over the provinces.¹²⁸

Monroe did not recognize the provinces as independent states because the military and governmental conditions in the provinces were uncertain,¹²⁹ with Spanish armies having launched attacks that were successful in most of the provinces.¹³⁰ To determine the actual conditions on the ground, Monroe sent a fact-finding commission.¹³¹ The commissioners were instructed to meet with the authorities in actual control of territorial areas, whether Spanish or insurgent, and report their findings.¹³² The

121. 32 ANNALS OF CONG. 1655.

122. GOEBEL, *supra* note 36, at 124.

123. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 208 (D.C. Cir. 2013) (quoting GOEBEL, *supra* note 36, at 124).

124. SAMUEL FLAGG BEMIS, *THE LATIN AMERICAN POLICY OF THE UNITED STATES: AN HISTORICAL INTERPRETATION* 36–47 (1943); FREDERIC L. PAXSON, *THE INDEPENDENCE OF THE SOUTH AMERICAN REPUBLICS: A STUDY IN RECOGNITION AND FOREIGN POLICY* 174 (2d ed. 1916) (1903).

125. *See infra* note 188 and accompanying text.

126. *See* Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 858 (1972) (noting the overwhelming popular support in the United States for the Latin American revolutionaries).

127. GOEBEL, *supra* note 36, at 120–21.

128. James Monroe, First Annual Message (Dec. 2, 1817), in 2 MESSAGES AND PAPERS, *supra* note 78, at 11, 13.

129. *See* PAXSON, *supra* note 124, at 129 (explaining that Monroe and Adams were determined not to make a decision regarding recognition of the provinces without more information about the situation in Latin America).

130. GOEBEL, *supra* note 36, at 118 (stating that the Spanish recovery of Venezuela "paralyzed the revolutionary movement" until 1819); PAXSON, *supra* note 124, at 121 (stating that the Spanish armies were thus far everywhere victorious except in Buenos Ayres).

131. PAXSON, *supra* note 124, at 122–24.

132. *Id.* at 124–27. Goebel asserted that historians exaggerate the importance of this mission. GOEBEL,

administration's position on when the provinces were entitled to recognition as new states was not different than Clay's—that should occur when the insurgents won the civil war against Spain, secured the actual independence of the provinces from foreign rule, and established viable governments. The disagreement was whether those conditions had been in fact been fulfilled.

While these events were taking place, relations with Spain had deteriorated because of financial and boundary conflicts in Florida, culminating in General Andrew Jackson's invasion in the First Seminole War.¹³³ Secretary of State John Quincy Adams initiated negotiations with Spain with the goal of peacefully settling the claims and obtaining Florida.¹³⁴ The negotiations had been suspended by Spain when the commissioners left for Latin America on December 4, 1817.¹³⁵ Two days after they left, Henry Clay announced his intention to present a motion in the House to recognize the independence of Buenos Ayres.¹³⁶

The debate over Clay's motion took place in March 1818. The opposition to Clay's motion on constitutional grounds was certainly one argument presented by supporters of the Monroe administration. But whether the constitutional issue was a primary cause of Clay's defeat is highly questionable. The debate over Clay's motion pivoted on two nonconstitutional questions as well: (i) whether the provinces *should be* recognized under the law of nations; and (ii) whether the conflict in Congress was really a political attack by Clay on the Monroe administration.

The administration's principal supporter was Representative John Forsyth, the Chairman of the House Committee on Foreign Affairs.¹³⁷ Forsyth asserted that the President and the Senate were generally responsible for the conduct of foreign relations.¹³⁸ They, and not the House, had the constitutional authority to decide whether a minister should be sent to the United Provinces.¹³⁹ But Forsyth did not claim that the President had an exclusive recognition power. He argued that under the constitutional scheme, the President should take the initiative on recognition and that the House of Representatives had a checking role. The House could effectively veto the President's decisions by refusing to appropriate funds for diplomatic representatives. As Forsyth saw the constitutional issue, the question was who should take the lead—the President

supra note 36, at 120. He dismissed it as simply an administration exercise in stalling, claiming that the commissioners could not talk to the insurgents. *Id.* This claim is incorrect. The instructions to the commissioners were explicit in directing them to talk to the insurgent leaders as well as the Spanish authorities. Letter from Richard Rush, Sec'y of State ad interim, to Caeser A. Rodney & John Graham, Special Comm'rs of the U.S. to S. Am. (July 18, 1817), in 1 *DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES CONCERNING THE INDEPENDENCE OF THE LATIN-AMERICAN NATIONS* 42, 43–45 (William R. Manning ed., 1925).

133. See BEMIS, *supra* note 124, at 35–38.

134. See James Monroe, First Annual Message (Dec. 2, 1817), *supra* note 128, at 13–14.

135. *Id.* at 13; see also ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: THE ORIGINS* 341 (1976) (noting the “difficult negotiation[s]” over Florida between Spain and the United States in 1817).

136. GOEBEL, *supra* note 36, at 121.

137. PAXSON, *supra* note 124, at 134.

138. 32 *ANNALS OF CONG.* 1502 (1818) (statement of Rep. John Forsyth).

139. *Id.*

or the House of Representatives—and his answer was the President.¹⁴⁰

The bulk of Forsyth's argument dealt with the law of nations and foreign policy rather than the allocation of constitutional power. He was sympathetic to the cause of the insurgents,¹⁴¹ but he saw no reason to even consider Clay's motion because the United Provinces had not formally requested recognition.¹⁴² Forsyth then asserted that the United Provinces was not entitled to be recognized regardless of which branch of government held that power.¹⁴³ The civil war between Spain and the insurgents fighting for independence was still unresolved, and Spain was in control of most of the provinces.¹⁴⁴ Under the law of nations, the United States had a duty to remain neutral in that conflict until one side was victorious.¹⁴⁵ Moreover, there was no functioning government in the United Provinces; even in areas controlled by the insurgents, military juntas regularly overthrew their predecessors.¹⁴⁶ And, most importantly, Forsyth warned that prematurely recognizing the independence of the Provinces—which amounted to encouraging the dissolution of the Spanish empire—could lead to war with Spain.¹⁴⁷

Two other representatives argued that Clay's motion was unconstitutional because it would amount to a legislative usurpation of the Executive's recognition power.¹⁴⁸ But they too argued that the Provinces should not be recognized as a matter of the law of nations and foreign policy. They asserted that no one knew if La Plata was independent or if it had a viable government; the President sent a commission to determine these facts, but it had not returned.¹⁴⁹ Moreover, they added, there was no commercial or political benefit in the premature recognition of the provinces¹⁵⁰—an act that could provoke a war with Spain.¹⁵¹ Another representative, reluctantly entering what he described as a "wide and diffuse debate,"¹⁵² asserted that Clay's motion was unconstitutional because it usurped the roles of the President and the Senate in appointing diplomats.¹⁵³ He also joined the other opponents in arguing at length that the United States had no interest in recognizing the provinces and no knowledge of the

140. *Id.* at 1502–03.

141. *Id.* at 1511.

142. *See id.* at 1502 ("It had not as yet appeared that the Government of La Plata desired or expected us to make such an acknowledgment; at least no one with requisite authority was known to have been sent to this country for the purpose of asking such a favor.")

143. *Id.* at 1505.

144. *See id.* at 1509 (stating that thirteen million of the eighteen million inhabitants of Latin America were under Spanish rule).

145. *Id.* at 1517–18.

146. *Id.* at 1506, 1511–12, 1518–22.

147. *Id.* at 1503–05, 1518.

148. *Id.* at 1538–39 (statement of Rep. Samuel Smith); *id.* at 1569 (statement of Rep. Alexander Smyth).

149. *Id.* at 1539 (statement of Rep. Samuel Smith); *id.* at 1571 (statement of Rep. Alexander Smyth).

150. *Id.* at 1541–43 (statement of Rep. Samuel Smith).

151. *Id.* at 1541–44; *id.* at 1576–78 (statement of Rep. Alexander Smyth); *see also id.* at 1599 (statement of Rep. Hugh Nelson) (warning that recognition could provoke Spain into declaring war); *id.* at 1624–26 (statement of Rep. George Poindexter) (stating that the United States has no interest in recognizing the provinces and that the House has no knowledge of the facts on the ground).

152. *Id.* at 1621 (statement of Rep. George Poindexter).

153. *Id.* at 1630–31.

actual facts on the ground.¹⁵⁴

Partisan politics also played a major role in these congressional debates. Clay had wanted and expected to be appointed by Monroe as Secretary of State, which was then a stepping-stone to the presidency.¹⁵⁵ He was humiliated when Monroe passed him over, and the humiliation turned into anger when Monroe instead chose John Quincy Adams, who was both a political rival of Clay's and a person whom Clay despised.¹⁵⁶ By challenging Monroe and Adams on the recognition of the Latin American republics, Clay seized on a popular position that would enhance his public stature and embarrass the administration. Administration supporters charged that he sought legislative recognition of the provinces for crass political purposes.¹⁵⁷ Whether true or not,¹⁵⁸ there was a widespread perception that this was Clay's actual motive. As even Clay's most admiring biographers admit, many people believed that his drive to recognize the provinces was propelled by raw ambition¹⁵⁹ and therefore likely was another factor in Clay's defeat.

Given the multiplicity of reasons for opposing Clay's motion, it is unlikely that Clay's defeat resulted from an acknowledgment by the House of Representatives that the recognition power is exclusively in the Executive.

2. Clay's Subsequent Motions, the Transcontinental Treaty, and Executive-Legislative Cooperation

The difficulty in attributing Clay's defeat to constitutional qualms in Congress is reinforced by subsequent events. President Monroe's commissioners returned with conflicting and unhelpful information.¹⁶⁰ The bottom line, however, was that the Latin American provinces, including the United Provinces, were in a state of turmoil without effective governments.¹⁶¹ Monroe stated that the United States would remain neutral until the civil war was resolved and stable governments were established.¹⁶²

Adams's lengthy negotiations with Spain ended in a phenomenal success, with Florida being ceded to the United States and almost all disputes between the two countries resolved in favor of the United States.¹⁶³ The Transcontinental Treaty was

154. *Id.* at 1621–27.

155. DAVID S. HEIDLER & JEANNE T. HEIDLER, HENRY CLAY: THE ESSENTIAL AMERICAN 129 (2010).

156. *Id.* at 133–34.

157. 32 ANNALS OF CONG. 1600–01 (statement of Rep. Hugh Nelson) (decrying that Clay's motion would create a faction within the governing Republican Party); *id.* at 1634–35 (statement of Rep. John Forsyth) (challenging Clay's motives).

158. *See* BEMIS, *supra* note 124, at 40 (stating that this was Clay's true motive); PAXSON, *supra* note 124, at 127–29 (stating that Clay's recognition motions might have stemmed from his anger at John Quincy Adams's appointment as Secretary of State).

159. HEIDLER & HEIDLER, *supra* note 155, at 136.

160. PAXSON, *supra* note 124, at 135.

161. *Id.* at 135–37.

162. James Monroe, Second Annual Message (Nov. 16, 1818), in 2 MESSAGES AND PAPERS, *supra* note 78, at 39, 39–47; *see also* PAXSON, *supra* note 124, at 137 (discussing Monroe's decision to have the United States stand neutral with regards to the dispute between Spain and the provinces).

163. BEMIS, *supra* note 124, at 36–37.

signed on February 22, 1819, and promptly approved by the Senate.¹⁶⁴ Spain was expected to ratify within the six-month period provided in the treaty.¹⁶⁵ However, on April 4, 1819, Clay made a second motion to recognize the United Provinces and the motion was narrowly passed by the House on May 10, 1819.¹⁶⁶ The revival of the recognition issue in Congress—which meant that the United States could officially endorse the dismemberment of Spain’s empire—jeopardized ratification of the Transcontinental Treaty.¹⁶⁷ Spain threatened nonratification to obtain a commitment from Monroe that the United States would not recognize any of the rebellious provinces.¹⁶⁸ Monroe rejected that demand and reaffirmed the policy of neutrality.¹⁶⁹ He also asked Congress to defer any consideration of issues related to Spain.¹⁷⁰ The Senate did not take up Clay’s motion. Having approved the Transcontinental Treaty, the Senate would hardly endanger Spain’s ratification by joining Clay’s recognition crusade.¹⁷¹

Spain delayed ratifying the Transcontinental Treaty for two years. Monroe received official notice of Spain’s ratification on February 13, 1821.¹⁷² Ten days earlier, with the Spanish message in transit, Clay submitted his third recognition motion.¹⁷³ This time, it was narrowly defeated.¹⁷⁴ Representative George Robertson of Kentucky, an erstwhile staunch supporter of Clay, who believed that the President could not recognize the provinces as independent states without the consent of the House and Senate,¹⁷⁵ switched his vote because, he said, Clay’s actions seemed to verify what many members believed—that Clay was acting out of illegitimate partisan

164. PAXSON, *supra* note 124, at 138; *see also* James Monroe, To the Senate and House of Representatives of the United States (Feb. 26, 1819), *in* 2 MESSAGES AND PAPERS, *supra* note 78, at 53, 53 (confirming Senate approval and ratification by the President).

165. Monroe, *supra* note 164, at 53.

166. 36 ANNALS OF CONG. 2223–29 (1820). The vote was 80–75. *Id.* at 2229–30. Unfortunately, there is no existing record of the debate.

167. PAXSON, *supra* note 124, at 138, 161–62.

168. *Id.* at 139–40.

169. *See* James Monroe, To the Senate and House of Representatives of the United States (Mar. 27, 1820), *in* 2 MESSAGES AND PAPERS, *supra* note 78, at 69, 69–70 [hereinafter Monroe, Mar. 27, 1820] (asking Congress to “postpone a decision on the questions now depending with Spain”); James Monroe, To the Senate and House of Representatives of the United States (May 9, 1820), *in* 2 MESSAGES AND PAPERS, *supra* note 78, at 70, 70–72 [hereinafter Monroe, May 9, 1820] (stating that the United States should remain neutral regarding Spain’s war with the provinces).

170. Monroe, Mar. 27, 1820, *supra* note 169, at 70; Monroe, May 9, 1820, *supra* note 169, at 72.

171. As Bemis asks, who “would have risked the success of the Transcontinental Treaty by any premature recognition of the inevitable independence of the new Latin American states?” BEMIS, *supra* note 124, at 39.

172. James Monroe, To the Senate of the United States (Feb. 13, 1821), *in* 2 MESSAGES AND PAPERS, *supra* note 78, at 83, 83. Because Spain had not ratified within the six-month period provided in the treaty, that provision was struck, and the amended treaty was resubmitted to the Senate for approval. *Id.*; James Monroe, To the Senate and House of Representatives of the United States (Feb. 22, 1821), *in* 2 MESSAGES AND PAPERS, *supra* note 78, at 84, 84.

173. 37 ANNALS OF CONG. 1029–30 (1821).

174. *Id.* at 1055 (the vote was 73–77).

175. *Id.* at 1047 (statement of Rep. George Robertson).

motives.¹⁷⁶

Each of the provinces declared independence when the Spanish armies were defeated, and the ratification of the Transcontinental Treaty was no longer an impediment to recognition.¹⁷⁷ Monroe still hesitated to recognize the provinces because the remaining task was the creation of stable and effective governments in the new states.¹⁷⁸ That occurred during 1821,¹⁷⁹ and, on March 8, 1822, Monroe told Congress that the provinces that had declared independence “ought to be recognized.”¹⁸⁰ But Monroe did not act unilaterally. He said that if Congress should “entertain similar sentiments, there may be such cooperation between the two departments of the Government as their respective rights and duties may require.”¹⁸¹ His message emphasized that the United States had strictly adhered to the law of nations during the entire civil war and that the provinces were now entitled to be recognized as independent states.¹⁸² “Should Congress concur in the view herein presented, they will doubtless see the propriety of making the necessary appropriations for carrying it into effect.”¹⁸³ Congress then enacted an appropriation act:

[F]or such missions to the independent nations on the American continent, as the President of the United States may deem proper, there be, and hereby is, appropriated, a sum not exceeding one hundred thousand dollars . . .¹⁸⁴

With this support from Congress, Monroe recognized the new states in Latin America.¹⁸⁵

What conclusions can be drawn from this historical experience? As a political matter, the answer is easy: Monroe and Adams won and Clay lost. As a constitutional matter, this history is inconclusive. One might emphasize the fact that Monroe did not act unilaterally in recognizing the new states and conclude that he accepted as necessary a legislative role in recognition. But cooperation with Congress was certainly the politically preferable course, and Monroe did not indicate that he was required to obtain congressional approval. On the other hand, Monroe never publicly stated that his recognition power was exclusive, and a nonexclusive power would be consistent with his reliance on the law of nations.¹⁸⁶ However, this is speculative; it is more likely that Monroe shared Adams’s strongly held opinion that the Executive had plenary recognition power.¹⁸⁷

176. *Id.* at 1044.

177. BEMIS, *supra* note 124, at 43.

178. PAXSON, *supra* note 124, at 163.

179. *Id.* at 169.

180. James Monroe, To the Senate and House of Representatives of the United States (Mar. 8, 1822), in 2 MESSAGES AND PAPERS, *supra* note 78, at 116, 118.

181. *Id.* at 116.

182. *Id.* at 116–17.

183. *Id.* at 118.

184. Act of May 4, 1822, ch. 52, 3 Stat. 678, 678.

185. BEMIS, *supra* note 124, at 46–47.

186. The Supreme Court had already held that the law of nations was binding on the Executive but could be overridden by congressional legislation. *The Nereide*, 13 U.S. (9 Cranch) 388, 422–23 (1815); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128–29 (1814); *see also Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43–44 (1800) (holding that Congress can increase executive power beyond that provided by the law of nations).

187. According to Adams, this was Monroe’s opinion. Diary Entry (May 13, 1824), in 7 MEMOIRS OF

Congress did not manifest any coherent point of view on the breadth of the recognition power. One can pick out certain statements in Congress and infer that the defeat of Clay's motion was caused by an understanding in the House of Representatives that the recognition power was an exclusive prerogative of the Executive. But the complexity of this history, the passage of Clay's second motion, and the multiple factors that undermined Clay's position render this proposition highly questionable. Indeed, although at one point in his treatise Goebel emphasized the constitutional issue, he concluded his discussion of Clay's defeat by reducing that issue to a "vague feeling" and emphasizing the political battle between Clay and Adams:

Clay, in an attempt to force the hand of the administration, had hoped to precipitate the recognition question, and it was the mere fact that the Monroe men commanded a majority that prevented a forcing of the issue, despite the vague feeling which prevailed that any action on the part of Congress would necessarily constitute an infringement upon executive prerogatives. Reduced to its simplest terms, the opposition in Congress was a struggle between Clay and Adams.¹⁸⁸

That the confrontation between Clay and the Monroe administration did not resolve any constitutional issue is reinforced by the interaction between the Executive and Congress over the recognition of Texas.

D. Jackson: Texas

In 1836–37, American settlers in Texas declared independence from Mexico, defeated an invading Mexican army, established the Republic of Texas, and requested American recognition and subsequent annexation. However, United States recognition of Texas as an independent state could have provoked a declaration of war by Mexico. Although Andrew Jackson was no shrinking violet when it came to executive power, he yielded the decision on Texas's recognition to Congress.

The Court of Appeals in *Zivotofsky* considered Jackson's decision to be one of political expediency and prudence.¹⁸⁹ Again, however, this oversimplifies a complex situation because Jackson said that he was referring the issue to Congress in compliance with the "spirit of the Constitution" and pledged to be bound by any resulting congressional decision on recognition.

Jackson had adopted a position of neutrality in the conflict between Texas and Mexico. In 1836, both the House and Senate passed resolutions stating that Texas "ought to be" recognized when the President determined that it established a stable and independent government.¹⁹⁰ On December 21, 1836, Jackson sent a message to

JOHN QUINCY ADAMS 328, 329 (Charles Francis Adams ed., 1875). For Adams's strongly held view that the President's recognition power was exclusive, see Diary Entry (Jan. 2, 1819), in 4 MEMOIRS OF JOHN QUINCY ADAMS, *supra*, at 203, 206; see also EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957, at 188 (4th rev. ed. 1957) (stating that Monroe believed that his recognition power was exclusive but prudently sought congressional cooperation).

188. GOEBEL, *supra* note 36, at 142–43; see also *id.* at 132 (stating that the political rivalry between Clay and Adams was at the root of the dispute).

189. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 210 (D.C. Cir. 2013).

190. The Senate's resolution stated "that the independence of Texas ought to be acknowledged as soon as the President shall have received satisfactory information that [Texas] has established an independent

Congress that had two purposes: to explain why he opposed recognizing Texas as an independent state and to yield the recognition decision to Congress.¹⁹¹

Referring to the recognition of the revolutionary French governments and the new states of Latin America, Jackson asserted that the consistent policy of the United States was *de facto* recognition—a policy that was “so firmly established . . . that no serious disagreement has ever arisen among ourselves in relation to it.”¹⁹² That policy required the United States to recognize a breakaway colony as a new state when it had conclusively secured its independence (of course, Jackson conveniently ignored Haiti). The United States had no right to judge the merits of the dispute; and a premature recognition, when the parent state still claimed sovereignty, could be a justifiable cause of war. Thus:

In the contest between Spain and her revolted colonies we stood aloof and waited, not only until the ability of the new States to protect themselves was fully established, but until the danger of their being again subjugated had entirely passed away. Then, and not till then, were they recognized.¹⁹³

Jackson acknowledged that the movement for Texan independence from Mexico was thus far successful and that Texas was presently independent.¹⁹⁴ The Texans had defeated an invading Mexican army and established a government that was in full control of the territory. But Jackson was concerned that Texas might not maintain its independence because there was still an “immense disparity” in physical force in favor of Mexico, and the new government of Mexico was threatening another invasion of Texas.¹⁹⁵ The United States should therefore remain neutral until that uncertainty was eliminated, as required by the law of nations.¹⁹⁶ Moreover, Texas sought not only recognition from the United States but also annexation. Mexico could certainly view recognition by the United States as a means to acquire a large amount of Mexican territory. The premature recognition of Texas would lead at least to hostile relations with Mexico and possibly to war.¹⁹⁷ Thus, Jackson’s position was that the United States should not recognize Texas until “the lapse of time or the course of events shall have proved beyond cavil or dispute the ability of the people of that country to maintain their

Government, capable of entering into relations of amity and commerce with foreign relations.” CONG. GLOBE, 24th Cong., 1st Sess. 479 (1836). This initial proposal was amended to include a clause “expressing the satisfaction of the Senate at the President’s having adopted measures for obtaining accurate information as to the civil, military, and political condition of Texas.” *Id.* The resolution as amended passed unanimously in the Senate by a vote of 39–0. *Id.* The House of Representatives then passed two similar resolutions. The first resolution stated “[t]hat the independence of Texas ought to be acknowledged by the United States, whenever satisfactory information has been received that it has in successful operation a civil government, capable of performing the duties and fulfilling the obligations of an independent power.” *Id.* at 486 (the vote was 128–20). The second resolution stated “[t]hat the House of Representatives perceive with satisfaction, that the President of the United States has adopted measures to ascertain the political, military and civil condition of Texas.” *Id.* (the vote was 113–22).

191. Andrew Jackson, To the Senate and House of Representatives of the United States (Dec. 21, 1836), in 3 MESSAGES AND PAPERS, *supra* note 78, at 265, 265–69.

192. *Id.* at 266–67.

193. *Id.* at 267–68.

194. *Id.* at 268.

195. *Id.*

196. *Id.* at 268–69.

197. *Id.*

separate sovereignty and to uphold the Government constituted by them.”¹⁹⁸

Having stated his own opinion that the recognition of Texas was premature, Jackson declined to express an opinion on “the strict constitutional right of the Executive, either apart from or in conjunction with the Senate, over the subject.”¹⁹⁹ Jackson stated:

Nor has any deliberate inquiry ever been instituted in Congress or in any of our legislative bodies as to whom belonged the power of originally recognizing a new State—a power the exercise of which is equivalent under some circumstances to a declaration of war; a power nowhere expressly delegated, and only granted in the Constitution as it is necessarily involved in some of the great powers given to Congress, in that given to the President and Senate to form treaties with foreign powers and to appoint ambassadors and other public ministers, and in that conferred upon the President to receive ministers from foreign nations.²⁰⁰

This statement is significant for an understanding of the Clay-Monroe dispute as well as for Texas. Jackson was a major actor in the conflict with Spain over Florida, and his Secretary of State, who presumably helped draft this message, was John Forsyth—Monroe’s principal congressional supporter in the debate over Clay’s recognition motion. If that debate had turned on the law of nations, foreign policy, and partisan politics, Jackson’s statement that there has been no “deliberate inquiry” in Congress over which branch held the recognition power makes sense. However, if the debate over Clay’s motion turned on the source of constitutional authority, Jackson’s statement is incomprehensible. Jackson plainly understood that the conflict between Clay and the Monroe administration did not settle any constitutional principle.

Having stated that the constitutional allocation of the recognition power was not settled, Jackson pledged that if Congress disagreed with his position that recognizing the Republic of Texas was premature, he would “promptly and cordially unite with you.”²⁰¹ Jackson said that he was yielding the recognition decision to Congress “on the ground of expediency.”²⁰²

But why was it “expedient” for Jackson to be bound by a congressional decision on recognition? Whatever might be the general rule on recognition, Texas was exceptional. This was the first apparent disagreement between the President and Congress on whether to recognize a new state or government, and it was important that they reach a united position.²⁰³ Still, that does not explain why the decision should rest with Congress and not the President. Jackson stated that Congress should prevail because the “spirit of the Constitution” tied this recognition decision to Congress’s war powers:

It will always be considered consistent with the spirit of the Constitution, and most safe, that it should be exercised, when probably leading to war, with a previous understanding with that body by whom war can alone be

198. *Id.* at 269.

199. *Id.* at 267.

200. *Id.*

201. *Id.* at 269.

202. *Id.* at 267.

203. *Id.*

declared, and by whom all the provisions for sustaining its perils must be furnished. Its submission to Congress, which represents in one of its branches the States of this Union and in the other the people of the United States, where there may be reasonable ground to apprehend so grave a consequence, would certainly afford the fullest satisfaction to our own country and a perfect guaranty to all other nations of the justice and prudence of the measures which might be adopted.²⁰⁴

Congress responded by enacting an appropriation that provided “for the outfit and salary of a diplomatic agent to be sent to the Republic of Texas, whenever the President of the United States may receive satisfactory evidence that Texas is an independent power, and shall deem it expedient to appoint such minister.”²⁰⁵

This statute was drafted carefully. By inserting a clause that the appropriation was conditioned on the President determining that Texas is an independent power, Congress also avoided the constitutional question of recognition authority and appeared to leave the recognition decision ultimately with Jackson. That was a gesture of cooperation by Congress because Jackson had already stated clearly in his message that Texas was presently independent. Jackson’s problem was a concern over whether Texas could maintain its independence, and the appropriation act said nothing about that. And, in addition to the statute, the Senate passed a resolution declaring:

[I]t is expedient and proper, and in perfect conformity with the laws of nations, and the practice of this Government in like cases, that the independent political existence of [Texas] be acknowledged by the Government of the United States.²⁰⁶

Jackson responded on his last day in office. Because the appropriations act and Senate resolution were, he said, “a virtual decision of the question submitted by me to Congress,” his “duty” was to acquiesce therein; and Jackson nominated a diplomat to the Republic of Texas.²⁰⁷

Jackson’s decision that Congress was the proper body to decide on the recognition of Texas is subject to differing interpretations. In *Zivotofsky*, the Court of Appeals focused on Jackson’s statement that he was acting on the ground of expediency and the fact that he did not disclaim any executive power over recognition.²⁰⁸ He studiously avoided the constitutional issue and sought a united political decision with Congress. One might therefore view Jackson as having sought advice from Congress, while reserving the final decision to himself. That interpretation is reasonable. However, an alternative interpretation is also reasonable because Jackson pledged to be bound by whatever Congress decided. Jackson’s deference to Congress seems inconsistent with recognition being *exclusively* an executive function. This was an instance in which the initiative over recognition was exercised by Congress with the President’s encouragement. Although Jackson probably believed that the Executive should ordinarily exercise the power of recognition, his message appears to be an

204. *Id.*

205. Act of Mar. 3, 1837, ch. 33, 5 Stat. 163, 170.

206. CONG. GLOBE, 24th Cong., 2nd Sess. 83 (1837).

207. Andrew Jackson, To the Senate of the United States (Mar. 3, 1837), in 3 MESSAGES AND PAPERS, *supra* note 78, at 281, 282.

208. *Zivotofsky ex rel. Zivotofsky v. Sec’y of State*, 725 F.3d 197, 210 (D.C. Cir. 2013).

acknowledgment that in extraordinary cases—those in which the stakes are very high (here, the potential for war)—the “spirit of the Constitution” calls for participation, and sometimes final decisions, by Congress.²⁰⁹ Even Julius Goebel, a strong advocate of executive power, read Jackson’s message that way: “In congressional control over recognition, Jackson saw greater guarantees against executive despotism.”²¹⁰

E. *Lincoln: Haiti, Liberia, and Mexico*

1. The Congressional Recognition of Haiti and Liberia

Haiti and Liberia were independent nations,²¹¹ but at least until the outbreak of the Civil War it was politically impossible for the United States to recognize those black republics. This changed when the Confederate states seceded from the Union and forfeited their influence over the federal government.²¹² Responding to an initiative from President Lincoln, Congress enacted legislation that recognized Haiti and Liberia.

In his December 3, 1861, message to Congress, President Lincoln proposed the recognition of Haiti and Liberia:

If any good reason exists why we should persevere longer in withholding our recognition of the independence and sovereignty of Hayti and Liberia, I am unable to discern it. Unwilling, however, to inaugurate a novel policy in regard to them without the approbation of Congress, I submit for your consideration the expediency of an appropriation for maintaining a chargé d’affaires near each of those new States. It does not admit of doubt that important commercial advantages might be secured by favorable treaties with them.²¹³

In *Zivotofsky*, the Court of Appeals explained this incident as follows: “President Lincoln expressed a desire to coordinate with the Congress by requesting that it use its appropriations authority to endorse his recognition of Liberia and Haiti. And the Congress subsequently did so.”²¹⁴ As shown below, this explanation is only partially correct. Congress went well beyond passing an appropriation statute and legislatively recognized Haiti and Liberia as independent nations.

Lincoln’s apparent decision to yield the initiative over recognition to Congress contains the same ambiguity as Jackson’s earlier decision concerning Texas. Lincoln did not claim or disclaim any independent executive power to recognize foreign states. Unlike Jackson, however, Lincoln did not discuss the issue of constitutional authority,

209. Andrew Jackson, To the Senate and House of Representatives of the United States (Dec. 21, 1836), *supra* note 191, at 267.

210. GOEBEL, *supra* note 36, at 158.

211. Haiti declared independence in 1804, but the United States refused to recognize that nation even after France acknowledged Haitian independence in 1825. Reinstein, *Haiti*, *supra* note 36, at 198, 216. In 1847, black émigrés from the United States issued a Declaration of Independence, enacted an American-model Constitution, and established the independent Republic of Liberia. J.H. Mower, *The Republic of Liberia*, 32 J. NEGRO HIST. 265, 265–69 (1947).

212. Reinstein, *Haiti*, *supra* note 36, at 193.

213. Abraham Lincoln, First Annual Message (Dec. 3, 1861), in 6 MESSAGES AND PAPERS, *supra* note 78, at 44, 47.

214. *Zivotofsky ex rel. Zivotofsky v. Sec’y of State*, 725 F.3d 197, 210 (D.C. Cir. 2013) (citation omitted).

nor did he pledge to be bound by a congressional decision. Lincoln invited a congressional role in recognition when a delicate issue was present (here the issue was race). However, his decision to enlist congressional support probably was motivated by considerations of political prudence rather than constitutional necessity.

Congress accepted the President's invitation and appropriated the funds that Lincoln sought, but it went much further. Congress enacted a statute entitled "An Act to authorize the President of the United States to appoint Diplomatic Representatives to the Republics of Hayti and Liberia, respectively."²¹⁵ In the statute's operative provision, Congress "authorized" the President to "appoint diplomatic representatives of the United States to the Republics of Hayti and Liberia, respectively," who shall be "accredited" as commissioners.²¹⁶ Instead of a mere appropriation, Congress enacted a statute that unequivocally recognized Haiti and Liberia by authorizing diplomatic relations with those countries.

The legislation was introduced in January 1862 by Senator Charles Sumner, the Chairman of the Senate Committee on Foreign Relations.²¹⁷ When the measure came up for debate, Sumner said that the President could have recognized Haiti and Liberia on his own and that Congress should cooperate with the President.²¹⁸ However, Sumner wanted Congress to recognize the black nations, and his bill authorized the President to establish diplomatic relations with the two countries.²¹⁹ Sumner explained that Haiti had unsuccessfully sought recognition from Congress decades ago and that such recognition was long overdue.²²⁰ He added: "[I]n proposing to appoint diplomatic representatives, we necessarily contemplate the negotiation of treaties and the establishment of friendly relations with these two republics under the sanctions of international law and according to the usage of nations."²²¹

The Chairman of the House Committee on Foreign Affairs, Representative Daniel W. Gooch, introduced the bill by stating: "This bill, Mr. Speaker, provides for the recognition by this Government of the independence of Hayti and Liberia, and the

215. Act of June 5, 1862, ch. 96, 12 Stat. 421, 421.

216. *Id.* The full text of the statute is as follows:

An Act to authorize the President of the United States to appoint Diplomatic Representatives to the Republics of Hayti and Liberia, respectively.

. . . That the President of the United States be, and he hereby is authorized, by and with the advice and consent of the Senate, to appoint diplomatic representatives of the United States to the Republics of Hayti and Liberia, respectively. Each of the said representatives so appointed shall be accredited as commissioner and consul-general, and shall receive the compensation of commissioners according to the act of Congress approved August eighteen, eighteen hundred and fifty-six: *Provided*, That the annual compensation of the representative at Liberia shall not exceed four thousand dollars.

Id.

217. CONG. GLOBE, 37th Cong., 2d Sess. 619 (1862).

218. *Id.* at 1773.

219. *Id.*

220. *Id.* at 1774–75.

221. *Id.* at 1773 (statement of Sen. Charles Sumner); *see also id.* at 1807 (statement of Sen. Charles Sumner) (confirming that the legislation will lead to full diplomatic relations, including the exchange of diplomats, between the United States and the two republics).

establishment of diplomatic relations with them.”²²² The debate on the bill was dominated by the issue of whether the United States should recognize black nations.²²³ But Congress’s authority to recognize Haiti and Liberia was not questioned, and both supporters and opponents of the bill emphasized that this legislation would recognize and initiate diplomatic relations with those two nations.²²⁴ The bill was passed by the House and Senate and became law when signed by President Lincoln on June 6, 1862.²²⁵

This was the third time that Congress exercised a legislative recognition power, and the first time that it recognized foreign states. There is an element of poetic justice in Congress recognizing Haiti. Fifty-six years after legislatively renouncing Haitian independence, Congress recognized the nation created from the ashes of a slave revolt.

2. The “Nonrecognition” of Maximilian

A conflict over recognition arose between the Lincoln administration and the House of Representatives during the Civil War. In 1864, the House unanimously passed a resolution opposing the recognition of any monarchy in Mexico. Secretary of State William Seward directed William Dayton, the United States Minister to France, to explain to the French government that the resolution had no effect on American foreign policy because the recognition power was exclusively in the President. The Senate did not act on the resolution. According to the Court of Appeals in *Zivotofsky*, this was a case of “the Executive branch challeng[ing] the individual houses of the Congress for intruding into the realm of recognition, which eventually led the Congress

222. *Id.* at 2498.

223. *See, e.g., id.* at 2502 (statement of Rep. Samuel Cox) (“Gracious heavens! what innocence! Objection to receiving a black man on an equality with the white men of this country? Every objection which instinct, race, prejudice, and institutions make. I have been taught in the history of this country that these Commonwealths and this Union were made for white men; that this Government is a Government of white men; that the men who made it never intended, by anything they did, to place the black race upon an equality with the white.”); *id.* at 1806 (statement of Sen. Garrett Davis) (“[The bill] is to establish diplomatic relations between the negro republics of Liberia and Hayti and the United States. . . . I oppose the sending of ambassadors of any class from our Government to theirs, upon this consideration: it would establish, diplomatically, terms of mutual and equal reciprocity between the two countries and us. . . . If a full-blooded negro were sent in that capacity from either of those countries, by the laws of nations he could demand that he be received precisely on the same terms of equality with the white representatives from the Powers of the earth composed of white people.”).

224. *See, e.g., id.* at 1806 (statement of Sen. Garrett Davis) (“I have not the least objection to the recognition by our Government of the existence of those two republics as independent Powers, and I have no objection to any extent of commercial relations between our country and those two republics.”); *id.* at 1807 (statement of Sen. Charles Sumner) (“[T]he Congress of the United States [should] undertake at this late day, simply in harmony with the law of nations, and following the policy of civilized communities, to pass the bill now under discussion.”); *id.* at 2527 (statement of Rep. William Kelley) (“The bill under special consideration is a bill to establish proper international relations between the United States and two great and rapidly-growing republics.”); *id.* at 2532 (statement of Rep. Benjamin Thomas) (“I desire to state very briefly the reasons which will induce me to vote for this bill, and especially for that portion of it which recognizes the independence and establishes diplomatic relations with the Republic of Liberia.”); *id.* at app. 252 (statement of Rep. Thomas Eliot) (“The recognition of Haytien independence is among the duties to be discharged by the present Congress, as an act both of justice and of policy. A bill similar in its provisions to the bill now before the House should have become a law many years ago.”).

225. Act of June 5, 1862, ch. 96, 12 Stat. 421.

to refrain from acting.”²²⁶

Actually, the House resolution probably died because it was an irresponsible action that threatened to poison United States relations with France, potentially leading to the threat of French intervention in the Civil War or a war with France over Mexico.

When the American Civil War erupted in 1861, President Juárez headed the Mexican government.²²⁷ The Juárez government was recognized by the United States, Great Britain, Spain, and France.²²⁸ But the latter three nations sent 10,000 troops into Mexico to forcibly collect on claims that were allegedly owed to them.²²⁹ Negotiations with Juárez led to agreements that all parties accepted, and Great Britain and Spain withdrew their forces in 1862.²³⁰ However, France remained, sent additional troops, and started a war against Juárez.²³¹ Napoleon III was taking advantage of the American Civil War to defy the Monroe Doctrine and establish a French empire in Mexico. The French army occupied Mexico City in June 1863 and installed Maximilian of Austria as the leader of a puppet government.²³²

Seward began protesting the French intervention in September 1863, but his protests used the language of diplomacy.²³³ Seward was careful not to invoke the Monroe Doctrine, and the protests were limited to warnings against any permanent occupation of Mexico.²³⁴ Until the end of the Civil War, the administration's policy was neutrality between France and Mexico, professing confidence in France's good faith.²³⁵

The administration was exceedingly cautious because of Napoleon III's sympathy for the Confederacy. Napoleon III had tried to intervene in the Civil War by proposing that the conflict should be mediated by France, Great Britain, and Russia, with a six-month armistice and the Union blockade lifted.²³⁶ Were this plan accepted, it would have been a decisive step towards European recognition of the Confederacy and probable Confederate independence; but it was rejected by Britain and Russia.²³⁷ When the potential for British and French recognition became dormant following Gettysburg and Vicksburg, the Confederacy's next move was a proposal that it would recognize Maximilian as the legitimate ruler of Mexico in return for his recognizing the Confederacy.²³⁸ Jefferson Davis sent a foreign minister to Maximilian, and the decision on reciprocal recognition was in the hands of Napoleon III.²³⁹

The House of Representatives did not share the executive branch's caution. On

226. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 208 (D.C. Cir. 2013).

227. J.G. RANDALL & DAVID DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 510 (2d ed. 1969).

228. *Id.* at 511.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 511–12.

234. *Id.* at 512.

235. SAMUEL FLAGG BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* 393 (4th ed. 1955).

236. *Id.* at 373.

237. *Id.* at 372–73.

238. RANDALL & DONALD, *supra* note 227, at 512.

239. *Id.*

April 4, 1864, it unanimously and without debate passed a resolution offered by Representative Henry Winter Davis that:

[T]he Congress of the United States are unwilling by silence to leave the nations of the world under the impression that they are indifferent spectators of the deplorable events now transpiring in the republic of Mexico, and that they therefore think fit to declare that it does not accord with the policy of the United States to acknowledge any monarchical Government erected on the ruins of any republican government in America under the auspices of any European Power.²⁴⁰

This impulsive resolution would have changed the United States' policy of neutrality in the war between France and Mexico and used language that could hardly have been more insulting towards France. Dayton reported in an April 22, 1864, letter that, upon receiving the House resolution, the French Minister for Foreign Affairs confronted him: "The first words he addressed to me on entering the room were, 'Do you bring us peace or bring us war?'"²⁴¹ Dayton's attempt to explain away the resolution was not successful, and Confederate agents used it to foment hostile relations between France and the United States.²⁴²

Lincoln and Seward quickly understood that the House resolution endangered the President's guiding axiom of "one war at a time." Three days after the resolution was passed (and before receiving Dayton's report), Seward wrote to Dayton that, while the administration privately shared the sentiments expressed by the House, turning those sentiments into the official public policy of the United States would be a grave error.²⁴³ Dayton was directed to explain to the French government that the recognition power was exclusively in the Executive, that the House resolution was not law because it was not passed by the Senate and approved by the President, and that President Lincoln had not changed the United States policy of neutrality in the war between France and Mexico.²⁴⁴ Dayton carried these instructions to the French Minister for Foreign Affairs, who expressed "gratification" but was concerned about possible action in the Senate.²⁴⁵

The extreme sensitiveness which was manifested by this Government when the resolution of the House of Representatives was first brought to its knowledge has, to a considerable extent at least, subsided.²⁴⁶

Seward's correspondence with Dayton was provided to Congress, and the House voted, without debate, to refer the matter to the Committee on Foreign Affairs.²⁴⁷ In the next session of Congress, the House went on record with a resolution asserting that Congress "has a constitutional right to an authoritative voice" on foreign policy, including the recognition of new governments.²⁴⁸ Davis's nonrecognition resolution did not reach the Senate floor. The Committee on Foreign Relations had rejected an earlier

240. CONG. GLOBE, 38th Cong., 1st Sess. 1408 (1864).

241. *Id.* at 2475 (letter from Dayton to Seward, Apr. 22, 1864).

242. *Id.*

243. *Id.* (letter from Seward to Dayton, Apr. 7, 1864).

244. *Id.*

245. *Id.* (letter from Dayton to Seward, May 2, 1864).

246. *Id.*

247. CONG. GLOBE, 38th Cong., 1st Sess. 1408 (1864).

248. CONG. GLOBE, 38th Cong., 2d Sess. 65 (1864).

hawkish Mexico resolution, with Senator Sumner charging that it was “madness” to pick a fight with France: “have we not war enough already on our hands, without needlessly and wantonly provoking another?”²⁴⁹ Davis’s motion was similarly stifled by the Committee.²⁵⁰ There is no evidence that Congress was relinquishing a power that it had exercised two years earlier in the recognition of Haiti and Liberia. The most likely explanation for the Senate’s action is that common sense prevailed over recklessness.

F. McKinley: Cuba

In 1898, Congress exercised the recognition power a fourth time by enacting a joint resolution declaring that Cuba was independent of Spanish colonial rule. President McKinley had opposed recognizing Cuban independence, but he acquiesced in Congress’s decision and signed the resolution into law.

The Spanish-American War was initiated when the Senate and the House agreed to a joint resolution authorizing and directing the President to use the military to force Spain out of Cuba. The joint resolution was signed by the President and became law on April 20, 1898.²⁵¹ Zivotofsky relied on the version of the resolution that had originally been passed by the Senate, which contained a declaration recognizing “the Republic of Cuba as the true and lawful Government of that Island.”²⁵² The Court of Appeals observed correctly that, as enacted, the joint resolution did not contain this clause, and the court concluded that “the recognition clause” had been removed at the insistence of the President.²⁵³ However, as will be explained below, the proposed Senate resolution that went to the Conference with the House of Representatives contained *two* recognition clauses: the first clause constituted United States recognition that Cuba was independent of colonial rule; and the second clause constituted United States recognition of the insurgent government that called itself the “Republic of Cuba.” The proposed House resolution that went to the Conference contained neither recognition clause, which reflected President McKinley’s position. The House, Senate, and Executive wound up compromising by retaining the first recognition clause and removing the second. The resulting legislation did not recognize a new state or government. It was, however, a legislative act of recognition that Cuba was independent and no longer a Spanish colony.

This congressional decision on recognition resulted from a complicated legislative debate involving a dispute within the Senate and a conflict by the Senate majority against the President and the House of Representatives.

249. CONG. GLOBE, 37th Cong., 3d Sess. 694, 695 (1863). The resolution was tabled. *Id.* at 704.

250. Its sponsor in the Senate, James McDougall, complained that the resolution was “buried, not five fathoms deep, but certainly as well buried as if . . . put into the tombs of the Capulets.” CONG. GLOBE, 38th Cong., 1st Sess. 3339 (1864); *see also id.* at 3495 (statement of Sen. James McDougall) (“I have been circumscribed . . . [and] surrounded by the Committee on Foreign Relations.”). Napoleon III vetoed the Confederate proposal for mutual recognition with Maximilian on account of the administration’s diplomacy and Napoleon’s problems in Europe. RANDALL & DONALD, *supra* note 227, at 512–13; JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 683–84 (1988).

251. Act of Apr. 20, 1898, ch. 24, 30 Stat. 738 (1898).

252. Zivotofsky *ex rel.* Zivotofsky v. Sec’y of State, 725 F.3d 197, 209 (D.C. Cir. 2013).

253. *Id.*

On April 11, 1898, President McKinley sent a message to Congress that sought authority to use United States military forces in Cuba.²⁵⁴ He related at length the bloodshed and devastation of the three-year insurgency, the failure of the United States to obtain a peaceful settlement through mediation, the cost to the United States in lost commerce, the dangers to American citizens on the island, and the explosion of the battleship *Maine*.²⁵⁵ There was no end in sight because “short of subjugation or extermination a final military victory for either side seems impracticable.”²⁵⁶ McKinley asked Congress for authority to intervene militarily for the sole purpose of pacifying the island, which would include establishing a “stable government, capable of maintaining order and observing its international obligations.”²⁵⁷

Although McKinley placed most of the blame on the Spanish authorities, he opposed recognizing either Cuban independence²⁵⁸ or the insurgent government called the Republic of Cuba. He quoted most of Jackson’s message on Texas and asserted that recognition of Cuban independence or of the Republic of Cuba was not warranted because the insurgents had not achieved, let alone maintained, independence from Spain.²⁵⁹ If a stable government of an independent Cuba were established in the future, it would be recognized. However:

To commit this country now to the recognition of any particular government in Cuba might subject us to embarrassing conditions of international obligation toward the organization so recognized. In case of intervention our conduct would be subject to the approval or disapproval of such government. We would be required to submit to its direction and to assume to it the mere relation of a friendly ally.²⁶⁰

The question, therefore, was on which side the United States would intervene, and McKinley’s answer was neither. He called for “[t]he forcible intervention of the United States *as a neutral* to stop the war,” which would involve “hostile constraint *upon both the parties* to the contest,” who would have to agree to a truce.²⁶¹ The grounds for intervention were “the cause of humanity,” protecting American citizens in Cuba, restoring American commerce, and ending the “present condition of affairs in Cuba [which] is a constant menace to our peace, and entails upon this Government an enormous expense.”²⁶² These grounds did not include Cuban independence. On the contrary, McKinley said that the United States should not intervene as an ally of either the insurgents or Spain but “as an impartial neutral by imposing a *rational compromise* between the contestants.”²⁶³

254. 31 CONG. REC. 3699–702 (1898).

255. *Id.*

256. *Id.* at 3700.

257. *Id.* at 3702.

258. *Id.* at 3700.

259. *Id.* at 3700–01.

260. *Id.* at 3701.

261. *Id.* (emphasis added).

262. *Id.*

263. *Id.* (emphasis added).

1. The House of Representatives' Proposed Joint Resolution

On April 13, 1898, the House Committee on Foreign Affairs introduced a proposed joint resolution with a preamble that blamed Spain for the war, the atrocities in Cuba, and the destruction of the *Maine*.²⁶⁴ The resolution itself was almost entirely consistent with McKinley's message. It did not recognize Cuban independence or the insurgent Republic of Cuba government, nor did it demand the withdrawal of Spain from Cuba. The resolution authorized and directed the President to intervene militarily to stop the war in Cuba, but without saying on whose side. It stated, however, that the goals of military intervention were to secure a "permanent peace" and to establish "by the free action of the people thereof a stable and independent government of their own in the Island of Cuba."²⁶⁵

A minority of the Committee offered an amendment "[t]hat the United States Government hereby recognizes the independence of the Republic of Cuba."²⁶⁶ In a brief debate, the amendment was opposed on the following grounds: (i) recognizing the insurgent government would violate international law because the insurgents had not won the war; (ii) the Republic of Cuba was not in control of the island or a stable government; and (iii) the House should follow the precedent of the Latin American provinces, which were not recognized until they were clearly victorious and had established stable governments.²⁶⁷ The amendment was defeated, and the proposed joint resolution was approved by the House.²⁶⁸

2. The Senate's Proposed Joint Resolution

The Senate Committee on Foreign Relations proposed a joint resolution on April 13, 1898, that went much further than President McKinley wanted or than the House proposed. As originally introduced by the Committee, there were three operative resolutions. The first declared "[t]hat the people of the Island of Cuba are, and of right ought to be, free and independent."²⁶⁹ The second demanded that Spain immediately relinquish authority over Cuba and withdraw its military forces.²⁷⁰ The third authorized and directed the President to use the entire military forces of the United States to carry these resolutions into effect.²⁷¹

264. The proposed resolution, following two long whereas clauses, was as follows:

Resolved . . . That the President is hereby authorized and directed to intervene at once to stop the war in Cuba, to the end and with the purpose of securing permanent peace and order there and establishing by the free action of the people thereof a stable and independent government of their own in the Island of Cuba. And the President is hereby authorized and empowered to use the land and naval forces of the United States to execute the purpose of this resolution.

Id. at 3810.

265. *Id.*

266. *Id.* at 3811.

267. *Id.* at 3818 (statement of Rep. Robert Adams).

268. *Id.* at 3819 (record of votes).

269. *Id.* at 3988.

270. *Id.*

271. *Id.* The initial proposed joint resolution reads as follows:

Resolved . . . First. That the people of the Island of Cuba are, and of right ought to be, free and independent.

The Committee Report emphasized that Congress should declare that Cuba was independent and no longer a Spanish colony. Spain had failed to suppress the insurrection, a large part of the island was free of Spanish control, and, by its repeated and brutal violations of the “laws of civilized warfare,” Spain had forfeited any claim of sovereignty over Cuba.²⁷² Thus, the declaration that the “people of the Island of Cuba are, and of right ought to be, free and independent” was a recognition of Cuban independence from colonial rule.²⁷³ The Committee Report argued at length that recognizing Cuban independence would not violate international law.²⁷⁴

A group of senators, including a minority on the Committee, thought that the recognition provision did not go far enough. They proposed that the resolution should not only recognize Cuban independence but also the Republic of Cuba as the legitimate government of the island.²⁷⁵ These senators argued that recognizing Cuban independence meant that the Cuban people had the right to establish their own government—and that the United States had no right to establish a government for them (as apparently contemplated by the President and the House).²⁷⁶ They contended that the Cuban people had established such a government because the Republic of Cuba had led the revolution, was the agency of the people, and had established itself sufficiently to be recognized.²⁷⁷ Moreover, they argued, the United States should recognize the insurgent government because it was needed as an ally in a military campaign against Spain.²⁷⁸ If the United States did not recognize the insurgent government, the United States military would appear as conquerors, and the Cuban people and the world would question American motives.²⁷⁹ And if the United States established a government for Cuba, it would then be responsible for the island and could get caught in a quagmire.²⁸⁰ Senator David Turpie, a member of the Committee’s minority, moved on the floor that the recognition provision in the proposed joint resolution be amended to add that “the Government of the United States hereby

Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

Id.

272. *Id.* at 3774.

273. *Id.* at 3773.

274. *Id.* at 3774–76.

275. *Id.* at 3776.

276. *Id.* at 3777–78 (statement of Sen. Joseph Foraker).

277. *Id.*

278. *Id.* at 3779.

279. *Id.* at 3786 (statement of Sen. William Lindsay); *id.* at 3789 (statement of Sen. James Berry).

280. *E.g., id.* at 3880–86 (statement of Sen. John Daniel); *id.* at 3890–91 (statement of Sen. Benjamin Tillman); *id.* at 3879–80 (statement of Sen. James Berry); *id.* at 3838–40 (statement of Sen. David Turpie); *id.* at 3785–88 (statement of Sen. William Lindsay); *id.* at 3778–80 (statement of Sen. Joseph Foraker).

recognizes the Republic of Cuba as the true and lawful government of that island.”²⁸¹

The Committee’s proposed joint resolution was attacked by another group of senators as going too far. It was simply not true, they asserted, that the people of Cuba are independent, because Spain was in control of part of the island and had not been defeated militarily.²⁸² Recognizing Cuban independence would therefore violate international law.²⁸³ Moreover, it was not at all clear that the United States should support the insurgents, who were pictured as unreliable, unstable, and the perpetrators of atrocities. Congress and the President should have a united position, and the recognition issues should be sorted out after Spain was expelled from the island.²⁸⁴

In addition to debating international law and policy, senators clashed over the recognition power. Opponents of the proposed joint resolution and the Turpie amendment argued that recognizing Cuban independence or the Republic of Cuba was an unconstitutional invasion of executive power.²⁸⁵ Supporters of these proposals argued that both the President and Congress possessed recognition powers and that legislative authority governed when exercised as incidental to congressional war powers.²⁸⁶ According to one senator, the Constitution did not explicitly grant the recognition power to either branch of government. These were implied powers in both Congress and the President, and legislative power prevailed in the case of a conflict.²⁸⁷ An influential senator who supported the Turpie amendment stated a third position: “I do not care what may be the law. I do not care whether the Executive is the man who shall declare the independence of the Island of Cuba or whether it is our act.”²⁸⁸

The Turpie amendment was passed by the Senate.²⁸⁹ The proposed joint resolution was passed as further amended by the addition of a fourth resolution (the Teller amendment) and a title for the legislation.²⁹⁰ The Senate’s proposed joint resolution read:

A joint resolution for the recognition of the independence of the people *and Republic* of Cuba, demanding that the Government of Spain relinquish its authority and government in the Island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the

281. *Id.* at 3776.

282. *Id.* at 3992 (statement of Sen. George Hoar).

283. *E.g., id.* at 3991 (statement of Sen. William Allison); *id.* at 3993 (statement of Sen. George Hoar); *see also id.* at 3818 (statement of Rep. Robert Adams).

284. *Id.* at 3892–93 (statement of Sen. Edward Wolcott); *id.* at 3842, 3887–88 (statement of Sen. George Gray); *id.* at 3878 (statement of Sen. Shelby Cullom); *id.* at 3845 (statement of Sen. Charles Fairbanks); *id.* at 3832–35 (statement of Sen. George Hoar).

285. *Id.* at 3992–93, 4033 (statement of Sen. George Hoar); *id.* at 3992 (statement of Sen. Nelson Aldrich); *id.* at 3991 (statement of Sen. William Allison); *id.* at 3990 (statement of Sen. Eugene Hale); *id.* at 3990 (statement of Sen. Arthur Gorman).

286. *Id.* at 3901, 4029–30 (statement of Sen. William Stewart); *id.* at 3886 (statement of Sen. John Daniel).

287. *Id.* at 4009–10 (statement of Sen. Joseph Rawlins).

288. *Id.* at 3898 (statement of Sen. Henry Teller). He supported the proposed joint resolution and the Turpie amendment, but he added an important amendment in which the United States disavowed any claim to Cuba. *Id.* at 3993.

289. *Id.* at 3988 (the vote was 51–37).

290. *Id.* at 3993 (the vote was 67–21).

United States to use the land and naval forces of the United States to carry these resolutions into effect.

. . . First. That the people of the Island of Cuba *are, and of right ought to be, free and independent, and that the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful Government of that island.*

Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination when that is accomplished to leave the government and control of the island to its people.²⁹¹

3. The Conference Joint Resolution

The Senate's proposed joint resolution was sent to the House, and the House adopted it as a substitute for its earlier proposal with two exceptions: the House would not recognize Cuban independence from Spain, and the House would not recognize the Republic of Cuba as the government of the island. Thus, the House changed the resolution by omitting the words that are italicized above: "are, and," and the clause following "independent" from the first resolution plus "and Republic" from the title.²⁹² This left the first resolution declaring only that the people of Cuba "ought to be" free.²⁹³

The Conference initially deadlocked. The Senate conferees offered to eliminate the references to the Republic of Cuba in return for the House conferees accepting that the people of Cuba "are" free and independent, but the offer was rejected.²⁹⁴ The House position was endorsed in the Senate by the opponents of the Foreign Relations Committee's original proposal, who again asserted that legislative recognition of Cuban independence was an unconstitutional invasion of the Executive's prerogative.²⁹⁵ But the majority of senators believed that it was essential for Congress to declare that Spain no longer had sovereignty over Cuba.²⁹⁶ The matter was returned

291. *Id.* (emphasis added).

292. *Id.* at 4017.

293. *Id.*

294. *Id.* at 4033.

295. *Id.* (statement of Sen. George Hoar) (expressing concern about usurping the President's powers as Commander in Chief and arguing that only the President has the power to recognize the independence of Cuba).

296. *Id.* (statement of Sen. Joseph Foraker) (emphasizing that it was necessary to declare Cuba independent from Spain in the event that the United States decides to wage war with Spain); *id.* at 4034-35

to the Conference, and a compromise was reached: the House conferees yielded by agreeing to recognize Cuban independence, and the Senate conferees yielded by agreeing to omit any recognition of the Republic of Cuba government.²⁹⁷ The House and Senate accepted this compromise and thereby passed a joint resolution recognizing Cuban independence from colonial rule.²⁹⁸ The President signed the joint resolution and, as enacted into law, the title was “Joint Resolution [f]or the recognition of the independence of the people of Cuba,” and the first resolution was “[t]hat the people of the Island of Cuba are, and of right ought to be, free and independent.”²⁹⁹

The Senate did not get all that it wanted, but the compromise with the House nevertheless produced an important legislative act of recognition—that Cuba was independent of Spanish or other colonial rule.³⁰⁰ This was the fourth time that Congress exercised the recognition power through legislation, and the first time it did so in opposition to the position of the President.

G. *Carter and Clinton: Taiwan*

Between 1898 and 1979, presidents consistently recognized new states and governments without any serious opposition from, or activity in, Congress. Following this eighty-year hiatus, the next interbranch conflicts over recognition occurred over Taiwan. I will first address the aspect of this contest that was raised in *Zivotofsky*—the 1994 Taiwan passport statute, upon which the Jerusalem passport statute was modeled. But another, and much more significant, conflict between Congress and the President over recognition was not discussed by the parties or the court—the 1979 Taiwan Relations Act.

1. The Passport Statute

The Jerusalem passport statute was modeled after the 1994 statute that gave American citizens born in Taiwan the right to list “Taiwan” as their place of birth on their passports.³⁰¹ The Court of Appeals in *Zivotofsky* accepted the Justice Department’s explanation that the Taiwan passport statute was irrelevant because the State Department complied “only after determining that doing so was consistent with United States policy that Taiwan is a part of China.”³⁰² But the Taiwan passport law

(statement of Sen. John Daniel) (arguing that under international law, a war with Spain over Cuban independence meant that the United States must declare Cuba independent of Spanish rule).

297. *Id.* at 4040.

298. *Id.* at 4040–41 (passing the Conference bill in the Senate 42–35); *id.* at 4063–64 (passing the Conference bill in the House 311–6).

299. Act of Apr. 20, 1898, ch. 24, 30 Stat. 738 (1898).

300. See 31 CONG. REC. 4082 (statement of Sen. Augustus Bacon) (by adopting the Conference Report, both the House and Senate voted to recognize the independence of Cuba from colonial rule; the only change in the Senate’s proposal was the failure to also recognize the insurgent government); CORWIN, *supra* note 187, at 189 (stating that the joint resolution was a congressional act of recognition).

301. Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 132, 108 Stat. 382, 395 (codified as amended at 22 U.S.C. § 2705 (2012)) (“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.”).

302. *Zivotofsky ex rel. Zivotofsky v. Sec’y of State*, 725 F.3d 197, 216 n.18 (D.C. Cir. 2013).

cannot be so easily disregarded because it treats American citizens born in Taiwan differently than those born anywhere else in China. Suppose, for example, that Congress enacted legislation giving American citizens born in Quebec the right to list “Québec” as their place of birth. Of course, the Executive’s policy is that Quebec is part of Canada, and this hypothetical statute does not explicitly state otherwise. Nevertheless, Congress would be sending an unmistakable message that the United States questions Canadian sovereignty over Quebec. The same kind of message was sent in the Taiwan passport law.

In fact, the Taiwan passport law is similar to the Jerusalem statute in that both deal with areas of disputed sovereignty. As will be discussed below, the Executive’s position of “strategic ambiguity”³⁰³ left open and subject to future developments the United States position on sovereignty over Taiwan, just as it has for sovereignty over Jerusalem. The real difference is not in the statutes or in their effects on recognition, but in the State Department’s differing assessments of the effects they would have on foreign relations.

The congressional and executive treatments of Taiwan are important to the scope of the recognition power, but the context is much greater than a passport statute. Limiting one’s attention to such minor legislation is akin to examining a sapling while ignoring the surrounding redwood forest. That forest is the Taiwan Relations Act. That law, and subsequent legislation concerning Taiwan, controlled and infringed upon one of the policies underlying the President’s recognition of the People’s Republic of China (PRC) and derecognition of the Republic of China (ROC).

2. The Taiwan Relations Act

As stated at the beginning of this Article, the recognition power includes more than symbolic legitimacy. Included within that power is the determination of the policy underlying recognition, which includes the critical issue of the scope of sovereignty.³⁰⁴ When President Carter recognized the PRC, his policy with respect to Taiwan was that the United States did not recognize either PRC sovereignty over Taiwan or Taiwanese self-government. Congress changed this critical policy in the Taiwan Relations Act.

a. The Presidential Recognition of the PRC and the Status of Taiwan

On December 15, 1978, President Carter and the PRC issued a Joint Communiqué stating that “The United States of America and the People’s Republic of China have agreed to recognize each other and to establish diplomatic relations as of January 1, 1979.”³⁰⁵ The agreement stated:

The United States of America recognizes the Government of the People’s Republic of China as the sole legal Government of China. Within this context, the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan.³⁰⁶

303. *Lin v. United States*, 561 F.3d 502, 506 (D.C. Cir. 2009).

304. See *supra* note 4 and accompanying text.

305. KERRY DUMBAUGH, CONG. RESEARCH SERV., 96-246, TAIWAN: TEXTS OF THE TAIWAN RELATIONS ACT, THE U.S.-CHINA COMMUNIQUE, AND THE SIX ASSURANCES 15 (1998).

306. *Id.*

The President's recognition of the PRC as the "sole" government of China thereby derecognized the Republic of China (ROC), located in Taiwan, as the government of China.

But the status of Taiwan was not resolved. Referring to the Shanghai Communiqué issued by President Nixon and the PRC in 1972, the Joint Communiqué stated that "[t]he Government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China."³⁰⁷ Notably, President Carter only acknowledged the PRC's claim to govern Taiwan; he did not accept it. This was the policy of "strategic ambiguity": the United States recognized the PRC, and not the ROC, as the government of China but refused to recognize *either* that the PRC had sovereign power over Taiwan *or* that Taiwan was itself a sovereign entity.³⁰⁸

This position was reiterated in the U.S.-China Joint Communiqué of 1982, which was issued by President Reagan and the PRC.³⁰⁹ During the negotiations for that Communiqué, the Executive gave "[s]ix assurances" to Taiwan.³¹⁰ Two provided:

5. The United States would not alter its position about the sovereignty of Taiwan—which was, that the question was one to be decided peacefully by the Chinese themselves—and would not pressure Taiwan to enter into negotiations with China.

6. The United States would not formally recognize Chinese sovereignty over Taiwan.³¹¹

Consistent with those assurances, President Reagan did not agree that the PRC exercised sovereignty over Taiwan. Instead, the 1982 Joint Communiqué stated only that "[t]he Chinese government reiterates that the question of Taiwan is China's internal affair," and that the United States disclaimed any intention of "pursuing a policy of 'two Chinas' or 'one China, one Taiwan.'"³¹²

b. The Taiwan Relations Act and Taiwanese Sovereignty

Following President Carter's recognition of the PRC, Congress enacted the Taiwan Relations Act (TRA),³¹³ retroactive to January 1, 1979.³¹⁴ Contrary to the consistent policy of the Executive that recognizes neither PRC sovereignty over Taiwan nor Taiwanese self-government, the TRA, in its original form and as amended in 1983,³¹⁵ treats Taiwan as self-governing and functionally as a sovereign entity.

307. *Id.*

308. See *Lin*, 561 F.3d at 504–06, for a detailed discussion of the policy of strategic ambiguity.

309. DUMBAUGH, *supra* note 305, at 16–17.

310. *Id.* at 18.

311. *Id.*

312. *Id.* at 16.

313. Pub. L. No. 96-8, 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. §§ 3301–3316 (2012)).

314. 22 U.S.C. § 3301(a).

315. Pub. L. No. 98-164, 97 Stat. 1017 (1983) (codified as amended at 22 U.S.C. § 3311 (2012)). The TRA is codified at 22 U.S.C. §§ 3301–3316.

i. The TRA and United States Law

The Taiwan Relations Act requires that, for all purposes of United States law, Taiwan shall be treated as if it were a recognized nation. The TRA provides:

The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan, and the laws of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.³¹⁶

The TRA goes on to require specifically that all laws of the United States referring to “foreign countries, nations, states, governments, or similar entities” shall apply to Taiwan.³¹⁷ And the term “Taiwan” is defined as including “the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and any successor governing authorities.”³¹⁸

These provisions mean that Taiwan and its government enjoy the privileges that American law afforded to the ROC before 1979 and continues to afford all other recognized countries and governments: suing in United States courts, asserting the defense of foreign sovereign immunity, and benefitting from the protections of the “act of state” doctrine.³¹⁹ Indeed, the State Department advised Congress that these privileges would be protected by the TRA.³²⁰

Another section of the TRA provides that:

Whenever the application of the laws of the United States depends upon the law that is or was applicable on Taiwan or compliance therewith, the law applied by the people on Taiwan shall be considered the applicable law for that purpose.³²¹

Inasmuch as “the law applied by the people on Taiwan” is the law enacted by their elected representatives, the TRA constitutes a congressional declaration that, under the laws of the United States, Taiwan is self-governing and the laws of the ROC supersede

316. 22 U.S.C. § 3303(a).

317. *Id.* § 3303(b)(1).

318. *Id.* § 3314 (emphasis added).

319. *See id.* § 3303(b)(7) (“The capacity of Taiwan to sue and be sued in courts in the United States, in accordance with the laws of the United States, shall not be abrogated, infringed, modified, denied, or otherwise affected in any way by the absence of diplomatic relations or recognition.”); *id.* § 3303(b)(3)(A) (“The absence of diplomatic relations and recognition with respect to Taiwan shall not abrogate, infringe, modify, deny, or otherwise affect in any way any rights or obligations (including but not limited to those involving contracts, debts, or property interests of any kind) under the laws of the United States heretofore or hereafter acquired by or with respect to Taiwan.”).

320. Acts of Foreign States, Digest of United States Practice in International Law 987–88 (1979) (“Following his appearance before the Senate Committee on Foreign Relations . . . the Legal Adviser of the Department of State, Herbert J. Hansell, wrote to the Committee Chairman, Senator Frank Church, under date of February 16, 1979, that both the act of state doctrine, as applied by United States courts, and the Foreign Sovereign Immunities Act (1976) would extend to acts of the Taiwan authorities.”); *see also* Millen Indus., Inc. v. Coordination Council for N. Am. Affairs, 855 F.2d 879, 882–84 (D.C. Cir. 1988) (holding that “the act of state doctrine applies to Taiwan as fully as if Taiwan were recognized by this country,” and foreign sovereign immunity applies to the Taiwanese counterpart of the American Institute of Taiwan); Weiming Chen v. Ying-Jeou Ma, No. 12 Civ. 5232(NRB), 2013 WL 4437607, at *3 (S.D.N.Y. Aug. 19, 2013) (holding that the President of Taiwan enjoys head-of-state immunity as a result of the TRA).

321. 22 U.S.C. § 3303(b)(4).

the laws of the PRC on Taiwan. To the extent that sovereignty is coterminous with the authority to enact and enforce laws, this provision establishes Taiwanese sovereignty for all purposes of U.S. law.

ii. The TRA and International Relations

The Taiwan Relations Act is not limited to the status of Taiwan under domestic law. The TRA directs that the United States “will” provide Taiwan with sufficient weapons and services “to maintain a sufficient self-defense capability,” and that the extent of the required support will be “based solely upon [the President’s and Congress’s] judgment of the needs of Taiwan.”³²² In 1994, a statute was enacted that this provision of the TRA “take[s] primacy over statements of United States policy, including communiques, regulations, directives, and policies based thereon.”³²³

The TRA also states that Congress “approves” the continuation in force of all preexisting treaties and international agreements with the ROC “unless and until terminated in accordance with law.”³²⁴ In addition to the passport law discussed above, Taiwan was included into the Visa Waiver Pilot Program, which preferentially allows residents of a small number of recognized countries (not including China) to enter and reside in the United States for ninety days without obtaining visas.³²⁵

Finally, the TRA created a mechanism for diplomatic relations between the United States and Taiwan. The TRA does not establish *formal* diplomatic relations, in the sense of exchanging ambassadors or having buildings called embassies. Instead, Congress created the functional equivalent—“The American Institute of Taiwan” (AIT).³²⁶ “[T]o the extent directed by the President,” the AIT is to carry out United States government programs, transactions, and other relations with respect to Taiwan³²⁷ and to enter into and enforce agreements relative to Taiwan.³²⁸ The TRA invites the creation of a Taiwanese counterpart to perform governmental functions and to negotiate with the AIT.³²⁹ Although the TRA describes the AIT as “a nonprofit corporation incorporated under the laws of the District of Columbia,”³³⁰ that designation is a diplomatic fig leaf. The AIT operates under the sole control of the State Department, is part of the executive branch, and has sovereign immunity from suit in American courts.³³¹ The TRA also authorizes reciprocal privileges and immunities for

322. *Id.* § 3302(a), (b). Presumably this refers to defense against the PRC and not, say, the Philippines.

323. Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 531(2), 108 Stat. 382, 480.

324. 22 U.S.C. § 3303(c); *see also* N.Y. Chinese TV Programs, Inc. v. U.E. Enters., Inc., 954 F.2d 847, 852 (2d Cir. 1992) (stating that “both Congress and the Executive Branch have, with rare clarity, determined that the United States must continue to honor” treaties with Taiwan, “despite official diplomatic derecognition”).

325. 8 C.F.R. § 217.2 (2012).

326. 22 U.S.C. § 3305.

327. *Id.* § 3305(a).

328. *Id.* § 3305(b).

329. *Id.* § 3309(a).

330. *Id.* § 3305(a)(1).

331. *Wood ex rel. United States v. Am. Inst. in Taiwan*, 286 F.3d 526, 534–35 (D.C. Cir. 2002).

governmental officials of the AIT and its Taiwanese counterpart.³³²

The establishment of the AIT and its Taiwanese counterpart was an innovative means by which Congress provided for government-to-government negotiations and other relations with Taiwan without formally recognizing the ROC as the government of Taiwan.³³³ If the law had authorized formal diplomatic relations, Congress would have legislated recognition of Taiwan according to international law. The TRA did not directly overturn the Executive's recognition decisions, but it gave Taiwan virtually all of the attributes of sovereignty and determined *how* the President's decisions to recognize the PRC and derecognize the ROC were to be carried out. Particularly when considered as a package, the Taiwan Relations Act appears to be a greater infringement on an exclusive presidential recognition power than the Jerusalem or Taiwan passport legislation.

iii. Executive and Congressional Authority Over Recognition

The legislative history of the Taiwan Relations Act is extensive and complex,³³⁴ but certain themes emerge fairly clearly.

First, the President's power to unilaterally recognize the PRC and derecognize the ROC was not seriously challenged. This stands in striking contrast to the heated debate over whether the President had the unilateral power to rescind the 1954 Mutual Defense Treaty with Taiwan.³³⁵

Second, although some members of Congress vehemently opposed Carter's recognition and derecognition decisions, there was little debate over whether the President's recognition power was exclusive. The subject came up in connection with proposals to establish formal diplomatic relations with the Taiwan government. The members of Congress who spoke to the constitutional issue asserted that recognition was an exclusive executive prerogative.³³⁶

332. "Upon the granting by Taiwan of comparable privileges and immunities with respect to the Institute and its appropriate personnel, the President is authorized to extend with respect to the Taiwan instrumentality and its appropriate personnel, such privileges and immunities (subject to appropriate conditions and obligations) as may be necessary for the effective performance of their functions." 22 U.S.C. § 3309(c).

333. See Lian Ming Lee v. Taipei Econ. & Cultural Representative Office, No. 4:09-cv-0024, 2010 WL 2710661, at *3 (S.D. Tex. July 6, 2010) ("TECRO [the Taiwanese equivalent of the AIT] operates as a de facto Taiwanese embassy, offering full consular services, serving as the official trade representative office established by the Ministry of Economic Affairs of Taiwan, and facilitating other cultural and education exchanges.").

334. The White House submitted a proposed bill that was immediately rejected as too weak. Senator Church, who chaired the Foreign Relations Committee, introduced—and dissociated himself from—the White House bill. 125 CONG. REC. 1283 (1979) (statement of Sen. Frank Church) ("While the recognition of the Peoples' Republic of China is a move I applaud and one that brings our policy in line with Asia realities, I consider the legislation deficient and in need of improvement in several areas."). Over a six-week period, the House and Senate voted for differing bills, although each was stronger than what the President wanted. The Conference was a three-way negotiation between the House, Senate, and Executive.

335. See Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. (forthcoming 2013) (manuscript at 34–36), for a discussion of those debates.

336. 125 CONG. REC. 6708 (1979) (statement of Sen. Frank Church) ("[T]he President agreed to recognize the Peking government as the sole legal government of China. This was his prerogative under our constitutional system, and it is not within the power of the Congress to overturn that decision. The Congress does not have the authority—constitutionally—to recognize a given government or to establish government-to-

Third, as in other historical incidents discussed in this Article, factors other than the constitutional allocation of powers were instrumental. The opponents of PRC recognition were a clear minority; most members of Congress either supported that recognition or viewed it as inevitable given the Shanghai Communiqué resulting from President Nixon's visit to China in 1972.³³⁷ Moreover, President Carter warned that he would veto any bill providing for formal diplomatic relations with Taiwan.³³⁸ And, perhaps most importantly, a legislative attempt to formally recognize the ROC as the government of Taiwan would have been rejected by the ROC, which insisted that it did not want to be recognized as the government of Taiwan because it claimed to be the government of all of China.³³⁹

Fourth, the major concern of members of Congress (including those who supported Carter's decisions) was that derecognizing the ROC would threaten the

government relations with a given country after the President has terminated those relations."'). Senator Robert Dole introduced an amendment, which was defeated, to provide Senate advice and consent to a presidential appointment of the director of the AIT. *Id.* at 4620. Senator Church opposed the amendment as reversing the President's recognition decision. *Id.* at 4621 (statement of Sen. Frank Church) ("If the Senate were to approve this amendment, it would be an act inconsistent with normalization of our relations with Peking. . . . Appointment of a Director of the American Institute in Taiwan through the procedures specified in the Constitution—that is to say, appointment by the President by and with the advice and consent of the Senate—would connote an official status, which is precisely what we seek to avoid in this legislation."'). Similarly, in the House, Representative Daniel Quayle introduced an amendment, which was also defeated, to establish a liaison office. *Id.* at 4519–20. The amendment was opposed as unconstitutionally infringing the President's recognition power. *Id.* at 4762 (statement of Rep. Ike Skelton) ("[A]ccording to the Constitution the President has two exclusive powers that no one, especially Congress, may invade. One is the right of pardon, and the other is the power to receive ambassadors, which includes the right of recognition and derecognition. . . . If we were to pass this amendment and subsequently pass this bill . . . it would be invading the prerogative of the President and the sole and exclusive rights afforded to him by the Constitution[.]").

337. *See id.* at 4491 (statement of Rep. Lawrence Fountain) ("[M]any of us in this House were, quite frankly, shocked and saddened by the President's decision last December to extend diplomatic recognition to the PRC without first arriving at a fair and responsible solution to the so-called Taiwan question. However, since former President Nixon's summit visit to mainland China in 1972 and the resulting Shanghai Communiqué, eventual diplomatic recognition of the PRC has been by and large a foregone conclusion in most minds."); *id.* at 4483 (statement of Rep. Donald Bailey) ("As I stated in a recent letter to the President, he is to be congratulated on accomplishing the long overdue and welcome recognition of mainland China as a member of the family of nations, but I fear we have corrected one error and committed another."); *id.* at 4485 (statement of Rep. Ken Kramer) ("It is not the establishment of full diplomatic relations with Peking that I challenge. This was desirable and perhaps inevitable. What I question is the terms on which this normalization was achieved."').

338. *See id.* at 4764 (statement of Rep. John Buchanan) ("I believe the President had the constitutional authority and the prerogatives to do what he did, although I disagree with him. I am quite certain the majority leader is right, that if we in this bill in any way include provisions that provide for government-to-government relations, the President will proclaim that to be an invasion of his constitutional prerogatives. He will veto the bill . . ."); *id.* at 4501 (statement of Rep. Clement Zablocki) ("But the question, in the final analysis, remains whether the President will veto this bill, and then there will be no vehicle to deal with the people, call it, if you wish, the Government of Taiwan, no vehicle, to have continuing relations between the United States and Taiwan."').

339. *See id.* at 4763–64 (statement of Rep. James Wright) ("The people on Taiwan for 30 years have maintained that theirs was and should be the proper government for all of China, including mainland China. Those on mainland China have maintained that theirs was and of right ought to be the government for all of China, including Taiwan. Now, the only way we can break apart from these two separate interpretations would be to establish a two-China policy. Both Taiwan and mainland China have rejected that conclusion."').

security of Taiwan and the legal rights that Taiwan and its people enjoyed under American law.³⁴⁰ On this matter, there seemed to be a consensus that Congress had the authority to determine the policy by which the President's recognition and derecognition decisions would be carried out. That is, Congress determined by legislation the scope and consequences of the Executive's decision to recognize the PRC and derecognize the ROC. The ranking minority member of the Senate Committee on Foreign Relations, Senator Jacob K. Javits, summarized this consensus when the legislation emerged from the Conference:

Neither bill [of the House and Senate] sought to reestablish official relations between the United States and the Republic of China on Taiwan; Congress . . . does not have the authority to do that even if it wanted to do so. Neither bill challenged the basic understandings on normalization of relations with the People's Republic of China.

The bill which emerged from the conference authorizes a full range of relations with Taiwan on an unofficial basis. Existing rights and obligations are protected, existing programs are preserved.

. . . .

. . . [F]oreign policy in this country is made by the President but with the advice and consent of the Congress, and, therefore, the Congress has a right to insert, in advising and consenting, the conditions which it deems appropriate to its advice and consent. That is what we did here.³⁴¹

The legislation stopped short—barely—of formally recognizing the ROC, but, contrary to the Executive's position of "strategic ambiguity," Congress gave the ROC practically all domestic and international rights of a recognized Taiwanese government. As a House sponsor of the legislation said of the Conference legislation:

What we have then in this bill constitutes a full recognition of Taiwan, in effect if not in fact.

. . . .

340. *See id.* at 4602 (statement of Sen. David Boren) ("We are here dealing, really, with an unprecedented situation. We are dealing with a situation in which, in fact, if not in theory . . . the government in question continues to be the effective government over a geographical area known as Taiwan. It continues to be the effective government of . . . 17 million free people, who participate in their own governmental affairs. We are not here dealing with a situation in which one regime has physically replaced another. We are dealing with a situation which our own Government has recognized as unique. It must be unique to continue in force 17 executive agreements and treaties with a nation which in theory we no longer recognize as a full governmental entity under international law."); *id.* at 4494 (statement of Rep. Richard Kelly) ("[T]he purpose of these remarks is not to question the recognition of the PRC, but to oppose action by the Congress that will complete the abandonment of the defense interests of the United States in the Western Pacific."); *id.* at 4502 (statement of Rep. James Wright) ("The Congress of the United States is here asserting its full partnership in foreign policy."); *id.* at 4505 (statement of Rep. Marc Marks) ("It is the prerogative and duty of the Congress to define the new authority on Taiwan and to assert its intentions to see that the people on Taiwan are allowed to pursue their lives in peace and prosperity.").

341. *Id.* at 6709 (statement of Sen. Jacob Javits); *see also, e.g., id.* at 4504 (statement of Rep. Marvin Edwards) ("While I recognize that constitutionally the President has the sole power to recognize a nation or not to recognize a nation—and he has undertaken to employ that power properly, although I would not have done it in the same way—as a separate and equal branch of government we are elected to exercise our judgment in terms of specific legislation implementing how that policy is going to be carried out, and we are not here for the purpose of merely rubber-stamping whatever comes down from the White House.").

This legislation . . . provides that our laws will continue to apply with full force to Taiwan, even in the absence of formal diplomatic relations. For those purposes, Taiwan shall remain a foreign country . . . Taiwan's rights and obligations under our laws shall not be abrogated, infringed, modified, denied, or otherwise affected by the absence of diplomatic relations and recognition.³⁴²

The net result of the Taiwan Relations Act and subsequent legislation appears to be that both Congress and the Executive agreed that each branch has a role in exercising the recognition power. Congress appeared to accept the President's formal power to recognize (and derecognize) foreign governments. But the President appeared to accept Congress's power to determine the scope of, and set conditions on, the executive recognition decisions. Congress walked a tightrope between directly challenging the President's prerogative, which would have provoked a veto, and enacting legislation that effectively, if not formally, contradicted the Executive's policy.³⁴³ Thus, the final legislation appeared formally to comply with the Executive's recognition prerogative but actually was inconsistent with and undermined a centerpiece of its recognition decisions—the strategic ambiguity over Taiwan's status. That is, the President's policy was that the United States would not recognize either PRC or Taiwanese sovereignty over the island. But the TRA recognizes Taiwanese sovereignty for all purposes of United States law and comes within an inch of formal recognition in international relations. Congress thereby substantially negated the Executive's policy of ambiguity concerning sovereign authority over Taiwan.

The congressional legislation concerning Taiwan resembles the 1898 legislation on Cuba. In both instances, Congress substantially strengthened the legislation proposed by the President³⁴⁴ and, while not formally recognizing a foreign state or government, enacted legislation that treated the people of those islands as independent of external rule. The TRA went even further in determining the policy to govern the question of recognition, which is central to the recognition power.

The administration's concern about the Taiwan legislation was less about legislative control over the recognition power than about the potential to disrupt the new relationship with China. The PRC's foreign minister submitted an official protest against the Conference bill, stating that it "is equivalent to recognizing Taiwan as a country and the authorities on Taiwan as a government."³⁴⁵ The U.S. Ambassador to

342. *Id.* at 6604 (statement of Rep. Lawrence Fountain).

343. *See id.* at 4499 (statement of Rep. Jonathan Bingham) ("The phraseology used in this bill has been very carefully worked out so as not to appear to attempt to reverse the action taken by the President that he was recognizing the PRC as the Government of China.").

344. *Id.* at 6707 (statement of Sen. Frank Church) ("[T]his conference report is a vast improvement over the legislation initially proposed by the administration. The measure as it now stands clarifies many uncertainties and ambiguities concerning trade, legal and economic issues. It includes a security clause designed to reassure Taiwan. And it provides for comprehensive congressional oversight of U.S. relations with Taiwan."); *id.* at 4475 (statement of Rep. Clement Zablocki) ("Frankly, Mr. Chairman, the President's proposed legislation troubled the Committee on Foreign Affairs in a number of respects. It was ambiguous and contained many deficiencies. The major deficiency was, it made no provision for American policy with regard to the future security of Taiwan.").

345. Telegram from the Embassy in China (Woodcock) to the Department of State (Mar. 16, 1979), in 8 U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 1977-1980: CHINA, at 835, 837 [hereinafter DEP'T OF STATE, CHINA].

Beijing concluded that the PRC's interest in normalized relations was so great that the Taiwan legislation would not fundamentally damage U.S.-China relations; he proposed that the President should issue a statement that the law would be implemented consistently with the understandings in the joint recognition communiqué.³⁴⁶ Carter did so, both in a communication to PRC officials and in his statement signing the legislation.³⁴⁷ As one perceptive National Security Council staffer had predicted: "The bottom line is that we are likely to get a piece of legislation just barely within the limits of what the President can sign."³⁴⁸

III. HISTORY, CONSTITUTIONAL DOCTRINE, AND NORMATIVE VALUES

A. *Conclusions from Post-Ratification History*

The conclusions that can be drawn from this post-ratification history depend in the first instance on the question being asked. If that question is whether this history supports an executive power to recognize foreign states and governments, the answer is certainly yes. Presidents have repeatedly recognized new states and governments, and this power has never seriously been challenged by Congress. The repeated exercise of this power by the Executive and its acquiescence by Congress has placed a "gloss" on the separation of powers.³⁴⁹ Post-ratification history thus sustains the authority of the President, as part of his power to conduct foreign relations, to take the initiative in recognizing foreign states and governments without specific congressional authorization.

However, the history recounted in this Article does not support an *exclusive* recognition power in the President. To validate that claim, the Court of Appeals in *Zivotofsky* advanced the narrative of a seamless post-ratification history in which

346. Telegram from the Embassy in China (Woodcock) to the Department of State (Mar. 27 1979), in DEP'T OF STATE, CHINA, *supra* note 345, at 854, 854–56.

347. Statement of Deputy Secretary of State Warren Christopher to Chinese Ambassador Chai Zemin (Mar. 27, 1979), in DEP'T OF STATE, CHINA, *supra* note 345, at 857; Presidential Signing Statement (Apr. 10, 1979), in DEP'T OF STATE, CHINA, *supra* note 345, at 859.

348. Madeline Albright, Weekly Legislative Report to National Security Advisor (Feb. 18, 1979), in DEP'T OF STATE, CHINA, *supra* note 345, at 794. The PRC continued to complain about the TRA throughout the remainder of the Carter administration. At one point, the PRC demanded that the legislation "must be rescinded if Sino-U.S. relations are to develop further." Memorandum from the President's Assistant for National Security Affairs (Brzezinski) to President Carter (Aug. 27, 1980), in DEP'T OF STATE, CHINA, *supra* note 345, at 1133, 1133. At another point, the PRC complained that in the period following normalization the United States dealt with Taiwan purely on the basis of the TRA and not the joint recognition communiqué. Telegram from the Department of State to the Embassy in China (Oct. 14, 1980), in DEP'T OF STATE, CHINA, *supra* note 345, at 1139, 1142. The PRC objected specifically to diplomatic privileges and immunities being given to Taiwanese representatives in the United States. *Id.*

349. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); see also *Medellin v. Texas*, 552 U.S. 491, 530–32 (2008) (stating that the Executive's authority to settle foreign civil claims through executive order derives from the "gloss" created by congressional acquiescence). I accept that an unbroken pattern of congressional acquiescence in an executive practice can establish an implied power in the President. However, see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 438–47 (2012), for an incisive argument that the concept of "acquiescence" is extremely difficult to apply—and may not be applicable in our post-Madisonian government.

presidents consistently claimed, and Congress consistently acquiesced in or acknowledged, an exclusive executive recognition power.

The detailed historical analysis in this Article demonstrates that the Court of Appeals' narrative overstates executive and understates legislative power. Some of the events relied upon by the Court of Appeals—Washington's recognition of the revolutionary French governments, the Clay-Monroe dispute, Jackson's yielding the recognition initiative over Texas to Congress, and the nonrecognition of Maximilian—are shrouded in plausible alternative explanations. Even more troubling for the claim of an exclusive executive power are those events in which Congress played a decisive role in recognition decisions. Congress exercised the recognition power by statute during the administrations of our second and third presidents when it enacted legislation declaring Santo Domingo and St. Domingue/Haiti as territories of France. Congress recognized Haiti and Liberia and authorized President Lincoln to commence diplomatic relations with those countries. Congress also recognized the independence of Cuba from Spanish control on the eve of the Spanish-American War. And more recently, Congress determined the policy that would govern the Executive's recognition decisions concerning China and Taiwan (in the TRA) and enacted statutes (the Jerusalem and Taiwan passport laws) that appear to infringe on a claimed executive prerogative.

For these reasons, post-ratification history provides little support for an exclusive recognition power. In reaching this conclusion, I am not asserting that this history definitively *refutes* that claim. There are, perhaps surprisingly, a relatively small number of occasions in which the source or scope of the recognition power was at issue. These incidents constitute a small fraction of the number of times that the Executive made uncontested recognition decisions. Congress has fully exercised a legislative recognition power only four times. The Taiwan Relations Act exercised a portion of that power by setting the policy governing recognition, but there was a strongly expressed view in Congress that it did not have the power to completely overturn the President's derecognition of the ROC. Moreover, presidents signed into law the four acts of congressional recognition, as well as the TRA and the Taiwan passport statute. Thus, there was no ultimate disagreement between the President and Congress in those instances. The same can be said of Jackson's decision to accept Congress's decision on the recognition of Texas. Other incidents examined in this Article are subject to differing interpretations. Finally, the history recited above contains an eighty-year gap—from Cuba to Taiwan—in which presidents regularly exercised the recognition power and Congress did nothing. During this period, the Supreme Court expressed increasingly strong dicta that the President's recognition power was exclusive,³⁵⁰ and this became the conventional scholarly wisdom.³⁵¹ Congress may not have acted on recognition during this long period because of a legislative consensus that it did not have the power to act.

The net result is that post-ratification history weighs against the President's recognition authority being exclusive, but it is not definitive. This history must be

350. See *supra* note 7.

351. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 (1987) (stating that recognition power belongs exclusively to the President).

considered in conjunction with constitutional doctrine and normative values. That examination involves the significance of presidential and congressional acquiescence, possible congressional acknowledgment of exclusive executive power, and the conflict between functional and structural constitutional analyses.

B. Presidential Acquiescence

On every occasion in which Congress has exercised the recognition power, the President signed the bills or resolutions into law. One might argue that there was no infringement of an executive prerogative because presidents agreed with Congress and made the ultimate decision on recognition when they signed the legislation or carried it into effect.

This argument is not factually or legally persuasive. President McKinley opposed recognizing Cuban independence from Spain, just as Jackson had opposed recognizing the Republic of Texas. And the Taiwan Relations Act went well beyond Carter's initial position. It is more accurate to say that these are situations in which presidents acquiesced to congressional decisions.³⁵²

As a legal matter, presidential approval of a congressional bill is not an exercise of the Executive's recognition power. The Presentment Clause³⁵³ makes the President a participant in the process by which legislation is enacted. When the President signs a bill presented by the House and Senate, he is exercising a legislative power that was designed to check the enactment of unconstitutional or unwise laws.³⁵⁴ That legislative power of the President can be exercised only in conjunction with Congress. It is not an executive power that is independent of Congress's legislative authority.

Moreover, the fact that the President and Congress may agree on recognition has no constitutional significance on the allocation of power between the two branches. The President and Congress cannot agree to violate the separation of powers. Recall that presidents signed and defended legislation that provided for one- or two-House congressional vetoes and executive line-item vetoes, but each was declared unconstitutional as violating a nondelegable prerogative of the other branch.³⁵⁵ If the recognition power is a plenary executive prerogative, it is difficult to understand how legislation that otherwise infringes on that prerogative becomes constitutional with the assent of the President.

352. The 1800 congressional recognition of Santo Domingo as a territory of France was made in the absence of any executive recognition but was consistent with President Adams's policies during the Quasi-War. Reinstein, *Haiti*, *supra* note 36, at 162. The 1806 recognition of St. Domingue as a French territory (and consequently the nonrecognition of Haitian independence) was consistent with President Jefferson's earlier recognition decision. *Id.* at 205–09. However, that statute contradicted Jefferson's free trade policy towards the island. *Id.* at 202. The 1862 congressional recognition of Haiti and Liberia was fully supportive of President Lincoln's position. *See supra* note 224 and accompanying text.

353. U.S. CONST. art. I, § 7 ("Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States.").

354. *See* THE FEDERALIST NO. 73, at 441 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (explaining that the veto power of the Executive serves two purposes: to protect against the passage of unwise laws and also to protect against encroachments on the Executive's own powers).

355. *Clinton v. New York*, 524 U.S. 417 (1998) (line-item veto); *Process Gas Consumers Energy Grp. v. Consumers Energy Council of Am.*, 463 U.S. 1216 (1983) (two-House veto); *INS v. Chadha*, 462 U.S. 919 (1983) (one-House veto).

As an example, suppose that a statute is enacted by Congress (and signed into law by the President) that directs the President to pardon a federal prisoner within five years. The President may have signed the law because he agreed that the individual should be pardoned. But suppose the President changes his mind or his successor refuses a pardon. The statute clearly would be inoperative as a constitutional infringement of an exclusive executive power. Then compare the TRA and the Taiwan passport statute. President Carter signed the TRA even though the newly recognized PRC objected to it, and President Clinton signed the law containing the Taiwan passport directive. Suppose a future President decides, for reasons of foreign policy, that either or both of these laws should no longer be enforced. Do the TRA and the Taiwan passport statute become unconstitutional because the President made a new assessment of their impacts on foreign policy? An argument based on presidential acquiescence amounts to the unsupportable proposition that a statute is constitutional or unconstitutional under the separation of powers depending on the political will of the Executive.

C. Congressional Acquiescence

The Supreme Court has adopted Justice Jackson's tripartite framework in the *Steel Seizure Case*³⁵⁶ as the governing approach to resolve conflicting claims of executive and legislative power.³⁵⁷ Executive power that rests on a constitutional "gloss" established by executive practice and congressional acquiescence³⁵⁸ falls within Jackson's second category, where the President "acts in absence of either a congressional grant or denial of authority."³⁵⁹ But executive powers in Jackson's second category do not displace concurrent and ultimately controlling congressional powers.

Consider, for example, an analogous executive power—sole executive agreements with foreign governments. As is true of recognition, Article II does not explicitly authorize the President to enter into sole executive agreements, but this has been an important foreign policy tool of the Executive since the administration of John Adams; and Congress has regularly acquiesced in those executive actions. That history established the President's authority to enter into such agreements;³⁶⁰ and, as valid exercises of federal governmental power, sole executive agreements therefore preempt conflicting *state* laws.³⁶¹

However, because sole executive agreements ultimately rest on a pattern of congressional acquiescence, they fall within Jackson's second category³⁶² and, like other nonenumerated foreign affairs powers (such as executive orders respecting international relations), do not displace Congress's authority to enact legislation under

356. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

357. *Medellin v. Texas*, 552 U.S. 491, 524-25 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006); *id.* at 638 (Kennedy, J., concurring); *Dames & Moore v. Regan*, 453 U.S. 654, 668-69 (1981).

358. *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring).

359. *Id.* at 637 (Jackson, J., concurring).

360. *E.g.*, *Medellin*, 552 U.S. at 530-32; *Dames & Moore*, 453 U.S. at 676-87.

361. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414-20 (2003).

362. *Medellin*, 552 U.S. at 528 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

its foreign commerce and other powers.³⁶³ Thus, if a sole executive agreement or an executive order conflicts with a *federal* law, the statute prevails.³⁶⁴ In short, the history of unchallenged sole executive agreements being used as instruments of foreign policy has created an implied power under Article II, but that implied power does not displace or override the legislative powers of Congress. The same analysis should apply to the executive recognition power.³⁶⁵

D. Congressional Acknowledgment

Inasmuch as the Executive has refused to comply with the directive of the Jerusalem passport statute, this places its actions in Jackson's third category, where executive power is at the "lowest ebb."³⁶⁶ Because congressional acquiescence is not sufficient to establish executive supremacy, the Justice Department constructed a historical narrative that Congress has affirmatively acknowledged the President's recognition power as exclusive. The post-ratification history provides little support for this narrative but does not definitively contradict it either.

For the eighty years between the Cuba and Taiwan incidents—when Congress took no action on recognition—a consensus appeared to develop in the courts and among scholars that the recognition power rested exclusively with the President. This twentieth-century history would be of lesser relevance for originalists than events at or near to the time of the founding. Those who view the separation of powers as an incrementally developing relationship between the branches would consider more

363. See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188–90 (1999) (holding that hunting and fishing rights granted to the Chippewa Indians by treaty could not be revoked by executive order); *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 328–29 (1994) (holding that foreign policies of the Executive cannot displace state law condoned by Congress under the Foreign Commerce Clause); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 459–62 (1899) (concluding that a financial dispute with Mexico was ultimately subject to congressional resolution).

364. Thus, in *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986), the Executive, through the secretary of commerce, entered into an agreement with Japan that was challenged as conflicting with an act of Congress. While finding no conflict, the Court made clear that the statute governed: "The Secretary, of course, may not act contrary to the will of Congress when exercised within the bounds of the Constitution. If Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter." *Id.* at 233; see also, e.g., *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 235 (D.C. Cir. 2003), *cert. denied*, 524 U.S. 915 (2004) ("There is no doubt that laws passed after the President enters into an executive agreement may abrogate the agreement."); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 182–83 (2d Cir. 1967), *cert. denied*, 390 U.S. 1037 (1968) (holding that the President's foreign affairs powers do not preclude statutory enactments by Congress on subjects in which it has an interest); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955) (holding an executive agreement unlawful because it conflicted with a federal statute regulating interstate commerce); *Swearingen v. United States*, 565 F. Supp. 1019, 1021 (D. Colo. 1983) (holding that an executive agreement related to, but not part of, the Panama Canal Treaty was invalid because of a conflict with the Internal Revenue Code); *Indep. Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 620 (D.D.C. 1980) (holding the President's Petroleum Import Adjustment Program invalid as contrary to the Energy Policy and Conservation Act).

365. See also Bradley, *supra* note 335, at 46–47 (arguing that the President may have the power to terminate treaties without the consent of the Senate, but that power is not exclusive of congressional control or override).

366. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

recent history as most significant.³⁶⁷ The argument would be that twentieth-century presidents regularly exercised the recognition power with very few conflicting actions of Congress. The Taiwan and Jerusalem legislation would be anomalies in an otherwise consistent pattern of executive action and congressional inaction.

However, even for incrementalists, inferring causality from congressional inaction is treacherous when the basis is mere acquiescence. Here, congressional inaction would be used as proof that Congress gave up a power that it had previously exercised. There is little evidence to support such a claim.³⁶⁸ The most obvious alternative explanation for twentieth-century congressional inaction on recognition is that there was no serious legislative opposition to the Executive on policy grounds, until, that is, President Carter made recognition decisions concerning China that appeared to many in Congress as jeopardizing a longstanding ally. And it is difficult to dismiss the Taiwan and Jerusalem legislation as anomalies when they represent the most current interactions between Congress and the executive branch over the recognition power.

The Taiwan Relations Act exemplifies the difficulties in applying a theory that Congress, through its inaction, acknowledged an exclusive recognition power in the President. There is an apparent contradiction between what members of Congress said in the debates and the legislation that Congress enacted. Leading members of Congress denied that President Carter's recognition of the PRC and derecognition of the ROC as the government of China could be overruled by legislation. However, the force of this position is clouded by other reasons pressing for a degree of congressional deference: the clear majority support for the President's recognition decisions, the threat of a veto if those decisions were formally challenged, and the ROC's refusal to be recognized merely as the government of Taiwan. Even putting that qualification to one side, this argument for exclusive executive power relies on what Congress did *not* do: it did not enact legislation *formally* recognizing the ROC as Taiwan's government. That argument does not account for what Congress actually *did*: it enacted legislation that determined the policy governing recognition—a policy that, in contrast to the Executive's, treats the people of Taiwan as self-governing and the ROC as its elected government. And as for whether Congress actually considers itself bound by the President's recognition decision, even as it relates to international relations, consider

367. See generally Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001).

368. The closest that I have found relates to President Franklin Roosevelt's recognition of the Soviet Union. Although that decision engendered public opposition, there was virtually none in Congress. Roosevelt recognized the Soviet Union during a congressional recess on November 16, 1933. After Congress convened in January 1934, the issue was not even brought up in the House. It was raised in the Senate only in the confirmation of William Bullitt as the first ambassador to the Soviet Union. There was a very brief debate during which three senators spoke. Two senators, who supported both the recognition decision and the confirmation, said that recognition was exclusively a presidential function. 78 CONG. REC. 460–68 (1934) (statement of Sen. Arthur Vandenberg); *id.* at 471–72 (statement of Sen. William King). But one qualified this statement by observing that the Senate had the sole power to confirm ambassadors (and could thus enable or defeat diplomatic relations), which made the issue a “common responsibility.” *Id.* at 461 (statement of Sen. Arthur Vandenberg). An opponent of recognition and confirmation conceded that recognition was “probably” an executive function. *Id.* at 468–69 (statement of Sen. Arthur Robinson). Following this abbreviated discussion, Bullitt was confirmed in a voice vote. *Id.* at 472.

the defense commitment in the TRA and the 1994 legislation declaring that statutory commitment “take[s] primacy over statements of United States policy, *including communiques*, regulations, directives, and policies based thereon.”³⁶⁹ According to this legislation, the TRA supersedes the 1978 Joint Communiqué in which the President recognized the PRC as the sole legitimate government of China.

Congressional inaction, particularly when combined with judicial dicta and scholarly commentary, can be used to infer legislative support for implied executive power. But past congressional inaction is not a necessary prologue for future congressional abdication. If recognition is a concurrent implied power of the two branches, Congress can control and override exercises of that power by the Executive, no matter how long it has acquiesced in the past. Using congressional inaction to transform an implied executive power into one that displaces legislative authority appears to be a form of legal alchemy. This argument incorrectly presumes that Congress agreed forever to abdicate a power that it had possessed and exercised. In the absence of powerful countervailing evidence, such as an unambiguous original understanding or clear structural constitutional constraints, accepting that proposition would take the separation of powers into unchartered territories.³⁷⁰

369. Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 531(2), 108 Stat. 382, 480 (emphasis added).

370. I have considered the possibility of a constitutional middle ground. A possible interpretation of the post-ratification history is that Congress cannot overturn an executive recognition decision but can take other actions that determine the policies by which the recognition is effectuated. This could lead to a compromise approach: Congress could legislate the policies governing recognition as long as the legislation did not infringe the “core” of the Executive’s recognition power. The development of the TRA can be viewed as an application of this approach. I do not find this approach to be persuasive for two reasons: historically, Congress has exercised the recognition power several times; and functionally, separating the act of recognition from the policies underlying that act would change the nature of the recognition power. If the President has the authority to determine whether a foreign government should be recognized, he necessarily has the power “to determine the policy to govern the question of recognition.” *United States v. Pink*, 315 U.S. 203, 207 (1942) (“The authority of the political department is not limited . . . to the determination of the government to be recognized. The President is also empowered to determine the policy to govern the question of recognition. Objections to the President’s determination of the government ‘as well as to the underlying policy’ must be addressed to the political department.” (quoting *Guar. Trust Co. v. United States*, 304 U.S. 126, 137–38 (1938))). Those policies are integral to the “international compact” by which the United States recognizes foreign governments. *United States v. Belmont*, 301 U.S. 324, 330 (1937) (“The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments.”).

This approach to reconciling legislative and executive power has worked politically, with Congress and the President contesting and resolving their respective powers as sensitive issues arose. Particularly when the issue is as incendiary as the status of Jerusalem, leaving the matter to the political branches may be the least undesirable of all alternatives. However, that bridge was crossed when the Supreme Court held that *Zivotofsky*’s case was justiciable. There does not appear to be any principled way in which courts could decide whether an executive policy related to recognition is at the core or periphery of the Executive’s recognition decision. These are issues in which courts would have little choice but to defer to the Executive’s judgment, and that judgment will likely be based more on the Executive’s assessment of policy considerations than effects on the recognition prerogative. The TRA highlights this point because the law appears to be inconsistent with a core policy underlying President Carter’s recognition and derecognition decisions but was nevertheless accepted by the President, who signed it into law. Another example is the Executive’s differential treatment of the Taiwan and Jerusalem passport statutes. *Zivotofsky* has argued, with considerable logic, that the designation of “Israel” on the passports of American citizens born in Jerusalem would no more infringe on

As in other areas concerning the separation of powers, the issue turns on which branch has the burden of persuasion. Justice Jackson placed that burden on the Executive when it acts contrary to the will of Congress:

Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.³⁷¹

The Executive cannot meet this burden of persuasion through the use of post-ratification history because the weight of the evidence tends strongly against exclusivity and is as best inconclusive. Unless there is a presumption in favor of exclusive executive power, that history does not sustain placing the President's recognition power above the law.

E. *Structure and Function*

The constitutional structure disfavors unchecked power in any branch of the government. Congress cannot exercise its lawmaking powers independently of the structural check of the President's qualified veto power. The Executive's powers are even more cabined. The Constitution vests a relatively small number of powers in the President, and most of those are subject to an absolute check by Congress as a whole or by the Senate. This is not an accident. Although Article II may contain the skeletal designs for the presidency, with the details to be worked out in practice, one founding principle could not be clearer—the President was not to exercise the prerogatives of a king. Thus, the bulk of the prerogatives held by George III (eighteen in number) were assigned to Congress in Article I, Section 8.³⁷² These include the most important

the President's recognition power or adversely affect foreign relations than the designation of "Taiwan" as a place of birth on passports. But the State Department enforces the Taiwan statute, asserting (I think disingenuously) that it is consistent with the Executive's "one China" policy, while contending that the Jerusalem statute, if enforced, could disrupt American foreign policy in the Middle East. These are decisions that are not fit for judicial determination. How could a court decide that the Jerusalem statute goes to the "core" of the Executive's recognition power but that the Taiwan statute does not?

Judging the constitutionality of legislation according to whether it is at the core of the Executive's recognition power inevitably leads to deferring to the Executive's determination of the statute's effects on American foreign policy. Those effects then become determinative of the scope of the Executive's recognition power. Because the policy underlying recognition is itself part of the recognition power, the inevitable consequence of this approach would be to make the Executive the final arbiter of the scope of its power—which means that the executive recognition power becomes exclusive. Unless the historical premise for this compromise approach is accepted, it is not a viable alternative for deciding whether the President or Congress has ultimate authority over recognition.

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

372. See Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 304 n.276 (2009) ("These include fourteen of the twenty-five specific plenary powers that are vested in Congress in Article I, Section 8: (1) regulating interstate commerce; (2) coining money; (3) regulating the value of money and of foreign currency; (4) fixing the standards of weights and measures; (5) granting patents; (6) creating the lower federal courts; (7) declaring war; (8) granting letters of marque and reprisal; (9) making rules concerning captures; (10) raising and supporting the armies; (11) providing and maintaining a navy; (12) making rules for the government and regulation of the army and navy; (13) providing for federalizing the militia; and (14) providing for organizing, arming, and disciplining the militia. In addition, four other royal prerogatives—(1) creating offices; (2) giving out pensions; (3) controlling immigration; and (4) determining the rights of

powers over foreign affairs—to declare war; to raise, support, and regulate the military; and to regulate foreign commerce. The President was delegated a small number of royal prerogatives over foreign affairs, but those were subject to congressional approval or control (including his foreign affairs powers to make treaties and to exchange diplomats with foreign nations)³⁷³ or were ministerial in nature.³⁷⁴ No parliamentary power was vested in the President, and he was enjoined to “take Care that the Laws be faithfully executed.”³⁷⁵ The constitutional structure of checks and balances does not support an exclusive (and uncheckable) recognition power in the Executive.

Consistent with this constitutional structure, the Supreme Court has thus far found only one exclusive presidential power that is not enumerated in the Constitution—the authority to remove executive officials.³⁷⁶ But that decision is supported by the deliberative legislation of the First Congress and by the necessity of insuring that President can discharge his constitutional obligation to faithfully execute the laws. Those considerations are not present in the recognition power.

A functional approach can lead to a different conclusion. The President conducts the foreign policy of the United States. Through his own diplomacy and the departments and agencies he controls, the President has a superior knowledge and expertise of foreign relations and an ability to act more expeditiously than a bilateral, multimember body such as Congress. That argues in favor of the Executive ordinarily exercising the recognition power independently of Congress. But that is a moot point because the President and Congress almost always agree on recognition decisions. The question arises only in the relatively rare circumstances of disagreement—when recognition decisions or their consequences are politically controversial, and perhaps inflammable. From the functional perspective of which branch could be expected to make better foreign policy decisions in such a politically charged environment, one

aliens—were also vested in Congress through the Necessary and Proper Clause.”).

373. *Id.* at 324. Thus, the executive veto of legislation could be overridden by supermajorities in Congress. *Id.* at 328. The commander-in-chief power was limited by congressional war powers and substantial control over the military. *Id.* at 301–02. The treaty and appointments powers (including the power to appoint diplomats) were subject to the approval of the Senate. *Id.* at 305. Only the pardoning power was plenary, but even it was limited to federal offenses. *Id.*

374. That is how Publius described the receipt of foreign ambassadors and public ministers. THE FEDERALIST NO. 69, *supra* note 26, at 418–19 (Alexander Hamilton).

375. U.S. CONST. art. II, § 3. The Framers’ decision to vest the most important royal prerogatives over foreign affairs in Congress, and to subject those vested in the President to senatorial veto, is in my view the conclusive answer to Justice Sutherland’s historical invention that international powers were passed from the Crown to the President. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316–21 (1936). The allocation of the internal and external royal prerogatives in Articles I and II of the Constitution may also answer an intriguing point made by Justice Thomas: “[M]uch if not all of Art. I, § 8 (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct.” *United States v. Lopez*, 514 U.S. 549, 589 (1995) (Thomas, J., concurring). This argument assumes that Article I should be viewed solely in terms of federalism. However, if Article I is understood as also delineating the separation of powers, its level of detail makes perfect sense: in granting these royal prerogatives to Congress, the Constitution explicitly denied them to the President. That is, without listing these specific prerogatives in Article I, the President could claim that, based on their English origins, they were implied (and perhaps exclusive) executive powers.

376. *Myers v. United States*, 272 U.S. 52 (1926). This decision was limited by *Humphrey’s Executor v. United States*, 295 U.S. 602, 627 (1935), and *Morrison v. Olson*, 487 U.S. 654, 686 (1988).

would expect that to be the President, who, in addition to having superior knowledge and a broader perspective, may be less susceptible to the influence of special interests and the perceived will of constituents.

However, the functional argument is in conflict with the structural priorities of the Constitution. In vesting the most important foreign affairs powers in Congress, the Constitution presupposes that the collective deliberations of the people's representatives should prevail when the stakes are highest. Moreover, the functional argument can be overdrawn. When the President takes the initiative in recognizing or derecognizing a foreign state or government, a congressional check on that decision would be considered only in highly unusual cases and would be quite difficult to enact. For Congress to override or limit a presidential recognition decision, majority votes in both Houses must be obtained against the declared views of a sitting president, the presence of party politics, and the norm that the nation should speak with one voice in foreign relations. And if such a bill passes both Houses, the President can of course defend his own position by vetoing it. Even when the President considers a veto impractical—such as when he objects to one provision in a fairly comprehensive statute—he has other measures to avoid an interbranch conflict, such as persuading Congress to make the provision advisory rather than mandatory or to include the option of a presidential waiver.

The present conflict between the Jerusalem passport statute and the Executive's recognition decision exists only because President Bush signed the bill into law instead of vetoing it or obtaining avoidance measures. The shortcut of signing the bill into law, refusing to enforce it, and allowing it to be adjudicated by the courts may have been politically attractive. Whether this is a "best practice" of the Executive is another matter that is unnecessary to explore here. But the failure to veto the legislation or to persuade Congress to make it advisory does speak to the President's lack of determination to protect his recognition decisions from conflicting legislation.

Ultimately, therefore, a normative choice must be made between which branch has the final authority over recognition. I do not discount the strong functional argument in favor of the President, but that argument has weak historical support. Moreover, the functional argument favoring executive power over recognition can apply to *every* major decision concerning foreign relations and therefore support plenary executive power over all contested aspects of foreign affairs.

A congressional check on executive recognition decisions also raises the specter of the United States speaking with more than one voice in foreign affairs. But that is an inevitable consequence of a constitutional system of divided government. If we return to "first principles,"³⁷⁷ the Framers designed a structural constitution that rests on different values—that uncheckable power should not be vested in one person and that the President is not above the law. "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."³⁷⁸

377. *Medellin v. Texas*, 552 U.S. 491, 524 (2008).

378. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring). Recall Justice Brandeis's memorable teaching: "The doctrine of the separation of powers was adopted by the

IV. CONCLUSION

Historical practice confirms that the President has the power to recognize foreign states and governments. But the text, original understanding, post-ratification history, and structure of the Constitution do not support the more expansive claim that this executive power is plenary. Under these circumstances, executive recognition decisions are not exclusive but are subject to laws enacted by Congress. In short, the President's duty remains to faithfully execute the laws.

Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).