Supplement to Curtis A. Bradley & Jack L. Goldsmith,

[This is the July 2015 Supplement for CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS (5th ed. 2014). Highlights include excerpts of the Supreme Court’s decisions in Zivotofsky v. Kerry (concerning the President’s authority to recognize foreign nations) and Bond v. United States (concerning the relevance of federalism to the statutory implementation of a treaty); a discussion of the legal issues relating to negotiations between the Obama Administration and Iran concerning Iran’s nuclear program; and an account of the legal issues surrounding the Obama Administration’s use of military force against the Islamic State of Iraq and the Levant (ISIL).]

Overview of International Law and Institutions

On page xxv, add the following at the end of footnote *:

For an overview of the status of international law in the United States, see Curtis A. Bradley, International Law in the U.S. Legal System (2d ed. 2015).

Chapter 1: Historical and Conceptual Foundations

On page 40, add the following Note before the “Note on Approaches to Constitutional Interpretation”:

11. Some of the reasoning in Curtiss-Wright reflects what might be called an “exceptionalist” approach to the treatment of U.S. foreign relations law. That is, for purposes of its constitutional analysis, the Court makes a sharp distinction between domestic and foreign affairs. In Ganesh Sitaraman & Ingrid Wuerth, The Normalization of Foreign Relations Law, 128 Harv. L. Rev. 1897 (2015), the authors contend that, since the end of the Cold War, the Supreme Court has been

* Instructors using the Bradley & Goldsmith casebook are authorized to distribute this supplement to their students for classroom use.
“normalizing” U.S. foreign relations law. Under their account, the Court has been treating foreign relations issues “as if they were run-of-the-mill domestic policy issues, suitable for judicial review and governed by ordinary separation of powers and statutory interpretation principles.” The authors also argue that this trend is desirable and should be continued. Among other things, they contend that many of the common functional justifications for treating foreign relations cases differently than domestic cases (such as arguments about executive expertise, the need for speed and secrecy, and the especially high error costs of erroneous decisions) are overstated. Although the authors do not attempt to explain why normalization is occurring, they do note that they “have a number of hypotheses: the perception of reduced risk of negative foreign affairs consequences after the Cold War, scholarly attacks on exceptionalist doctrine, the rise of the conservative legal movement, the Bush Administration’s overreaching legal arguments coupled with shocking uses of executive power, and the widespread acceptance of the Chevron [framework in administrative law].”


On page 41, add the following before Subsection C:

In NLRB v. Noel Canning, 134 S. Ct. 2550 (2014), the Supreme Court construed the Recess Appointments Clause (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”) to allow the President to make appointments during “intra-session” as well as “inter-session” Senate recesses, and even for vacancies that pre-date the recess. (The Court nevertheless held that the recess appointments at issue in the case were invalid because they occurred during a break in Senate business that was too short to constitute a recess.) In the course of its analysis, the Court confirmed the importance of looking to historic governmental practices when resolving questions relating to the separation of powers. The Court observed that, for questions concerning “the allocation of power between two elected branches of Government,” “significant weight” should be given to the practices of government, and that this is true “even when the nature or longevity of that
practice is subject to dispute, and even when that practice began after the founding era.”

Justice Scalia, writing for himself and three other Justices, disagreed with the majority’s approach. He acknowledged that, “where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision.” But he argued that “a self-aggrandizing practice adopted by one branch well after the founding, often challenged, and never before blessed by this Court—in other words, the sort of practice on which the majority relies in this case—does not relieve us of our duty to interpret the Constitution in light of its text, structure, and original understanding.” Scalia further contended that the majority’s approach improperly allows presidents to gain authority by means of “adverse possession”—that is, merely by acting in a certain way without sufficient congressional opposition. For additional discussion of the decision, see Curtis A. Bradley & Neil S. Siegel, After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession, 2014 Sup. Ct. Rev. 1.

Chapter 2: Courts and Foreign Relations

*On page 86, add the following at the end of Note 12:*

*See also Von Saher v. Norton Simon Museum of Art, 754 F.3d 712 (9th Cir. 2014) (remanding for a determination of whether a conveyance of art that had been confiscated by the Nazis was a sovereign act for purposes of the act of state doctrine).*

*On page 109, add the following at the end of Note 10:*


*On page 109, add the following Note after Note 10:*

**10a.** Some obligations in human rights treaties apply regardless of location. Other obligations, however, apply only to territory within a party’s jurisdiction. For example, Article 2 of the International Covenant on Civil and
Political Rights (ICCPR) provides that each party is obligated to respect the rights set forth in the Covenant for “individuals within its territory and subject to its jurisdiction”; Article 2(1) of the Convention Against Torture provides that each party “shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”; and Article 16 of the Convention Against Torture provides that each party is obligated to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.”

Since the mid-1990s, the U.S. government argued that these jurisdiction-based obligations did not apply outside the territory of the United States. See Beth Van Schaack, Extraterritorial Application of Human Rights Obligations: Now is the Time for Change, 90 Int’l L. Stud. 20 (2014). In 2005, for example, the government maintained before the UN Human Rights Committee that “the obligations assumed by a State Party to the International Covenant on Civil and Political Rights apply only within the territory of the State Party.” In lengthy memoranda from 2010 and 2013 that have now been made public, State Department Legal Adviser Harold Koh strongly disagreed with this territorial interpretation. These memoranda argue, among other things, that—unlike for federal statutes—there is no presumption against the extraterritorial application of treaties.

In March 2014, the Obama Administration reaffirmed (without explanation) the U.S. position that the ICCPR obligations apply only within the United States. In November 2014, however, the Administration shifted the U.S. government’s position with respect to the Convention Against Torture, accepting that the Convention’s jurisdiction-based obligations apply to “all places that the State Party controls as a governmental authority,” and that “the United States currently exercises such control at the U.S. Naval Station at Guantanamo Bay, Cuba, and with respect to U.S. registered ships and aircraft.” Opening Statement of Mary E. McLeod, Acting Legal Adviser, U.S. Department of State, Before the Committee Against Torture (Nov. 12-13, 2014), at https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/#.VGNsNRCburE.twitter. This concession is still narrower than the view articulated by many commentators and organizations, pursuant to which jurisdiction-based treaty obligations apply to all territory under a party’s “effective control.”
On page 120, add the following Note after Note 9:

9a. The U.S. Court of Appeals for the Ninth Circuit adopted a broad interpretation of the comity doctrine in *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014). That case concerned the bombing of a Colombian village by the Colombian air force in 1998, as part of a conflict with insurgents. Civilian victims of the bombing sought damages against various Colombian government defendants in the Colombian courts, and a criminal action was also brought in Colombia against three Colombian air force officers allegedly responsible for the bombing. While their damages action was pending in Colombia, the victims brought suit in a federal court in California against two U.S. corporations, alleging that the corporations had been involved in helping to plan and facilitate the bombing. In support of their claims, the plaintiffs relied on the Torture Victim Protection Act (TVPA), the Alien Tort Statute (ATS), and California state law. (Both the TVPA and the ATS are discussed extensively in Chapter 6 of the casebook.)

The court relied on international comity in directing a dismissal of the state law claims. International comity, the court reasoned, is a freestanding federal common law doctrine that can preempt state law, even when other bases for federal preemption are inapplicable. The court also concluded that for “adjudicatory comity”—that is, the deference that a U.S. court will show to foreign legal proceedings—no “true conflict” is required between U.S. law and foreign law in order for the U.S. court to abstain from exercising jurisdiction. (For the idea of a “true conflict” requirement for prescriptive comity, involving the extraterritorial reach of federal statutes, see Note 6 on page 106 of the casebook.)

Applying the comity analysis from the Eleventh Circuit’s decision in *Ungaro-Banages v. Dresdner Bank AG* (see pages 110-14 of the casebook), the court considered “the strength of the United States’ interest in using a foreign forum, the strength of the foreign governments’ interests, and the adequacy of the alternative forum.” The factors relevant to the strength of the U.S. interest, the court further explained, include “(1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the United States, and (5) any public policy interests.” Those factors favored dismissal of the state law claims in this case, the court reasoned, because (among other things) the conduct occurred outside the United States and the U.S. government had specifically indicated that it was concerned that the litigation would undermine U.S.-Colombian relations. While acknowledging that California might have some interest in allowing the plaintiffs’ claims, the court said that this interest “should not be overstated, given that Plaintiffs are not California citizens, that their claims concern events that occurred abroad, and that one Defendant (AirScan) is not a California resident corporation.”
As for the strength of Colombia’s interest, the court noted that Colombia had expressed concerns about the case and that its courts had already addressed the incident in civil and criminal litigation. Finally, with respect to the adequacy of the Colombian courts, the court pointed out that the plaintiffs had managed to obtain an appreciable sum of money in their suit against the government defendants. While Colombian law now precluded the plaintiffs from seeking a secondary recovery of damages from the corporate defendants, the court reasoned that this did not make the Colombian courts inadequate because such limitations on recovery are common, and the plaintiffs could have sued the corporations originally in their action in Colombia and had not done so. One of the judges in the case dissented, complaining that the majority had “needlessly announce[d] novel standards that will thwart the ability of not only these plaintiffs, but also of every other alien who seeks to hold a U.S. corporation accountable for atrocities committed abroad.”

To what extent does this decision extend the comity doctrine beyond the holding in Ungaro-Benages?

On page 120, add the following at the end of Note 10:

See also Fischer v. Magyar Allamvasutak Zrt, 777 F.3d 847 (7th Cir. 2015) (reaffirming exhaustion requirement in suit brought under the Foreign Sovereign Immunities Act, based on considerations of international comity).

Chapter 3: Congress and the President in Foreign Relations

On page 175, add the following at the end of Note 14:

For a study that finds, based on its review of the legislative history of a number of statutes, that “international law discourse is relatively prevalent in congressional arguments over bills whose enactment arguably triggers international law violations,” see Kevin L. Cope, Congress’s International Legal Discourse, 113 Mich. L. Rev. 1113 (2015). The author suggests that “members of Congress use the rhetorical device of international law to address international law-minded constituents and/or foreign governments, perhaps with a nudge from the more internationally oriented executive branch.”
On page 182, add the following excerpt and omit the D.C. Circuit’s opinion that is excerpted on pages 182-87:

**Zivotofsky v. Kerry (Zivotofsky II)**  
___ S. Ct. ___ (2015)

[Although Israel has controlled the western portion of Jerusalem since Israel’s founding in 1948 and has controlled the eastern portion since 1967, there is a longstanding dispute between Israel and the Palestinians over the city’s status. In an effort to remain neutral in this dispute, the executive branch has refused to recognize any country’s sovereignty over the city, insisting that the issue be resolved through negotiation. As part of this policy, when a U.S. citizen is born in Jerusalem, the State Department lists only “Jerusalem” as the place of birth when issuing passports and consular reports of births abroad. In 2002, however, Congress enacted the Foreign Relations Authorization Act for Fiscal Year 2003, Section 214 of which was titled “United States Policy with Respect to Jerusalem as the Capital of Israel.” Subsection d of this section provided that, “[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.” President George W. Bush signed the Act into law, but when doing so he issued a statement expressing the view that Section 214(d) would, “if construed as mandatory rather than advisory, impermissibly interfere with the President’s constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states.” Neither his administration nor the subsequent Obama Administration complied with Section 214(d). Through his parents, Menachem Zivotofsky, who was born in Jerusalem a few weeks after Section 214(d)’s enactment, challenged the State Department’s refusal to record “Israel” as the place of birth in his passport and in the consular report of his birth. The U.S. Court of Appeals for the D.C. Circuit ordered the suit dismissed on the ground that the constitutionality of Section 214(d) presented a nonjusticiable political question. The Supreme Court reversed in Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012), a decision excerpted in the casebook at pages 62-65. On remand, the D.C. Circuit held that Section 214(d) was unconstitutional because it invaded the exclusive authority of the President to recognize foreign sovereigns.]

**JUSTICE KENNEDY** delivered the opinion of the Court. . . .

Pursuant to § 214(d), Zivotofsky claims the right to have “Israel” recorded as his place of birth in his passport. The arguments in Zivotofsky’s brief center on his passport claim, as opposed to the consular report of birth abroad. Indeed, in the
court below, Zivotofsky waived any argument that his consular report of birth abroad should be treated differently than his passport. He has also waived the issue here by failing to differentiate between the two documents. As a result, the Court addresses Zivotofsky’s passport arguments and need not engage in a separate analysis of the validity of § 214(d) as applied to consular reports of birth abroad. . . .

II

In considering claims of Presidential power this Court refers to Justice Jackson’s familiar tripartite framework from Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (concurring opinion). . . .

In this case the Secretary contends that § 214(d) infringes on the President’s exclusive recognition power by “requiring the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns.” Brief for Respondent 48. In so doing the Secretary acknowledges the President’s power is “at its lowest ebb.” Youngstown, 343 U.S. at 637. Because the President’s refusal to implement § 214(d) falls into Justice Jackson’s third category, his claim must be “scrutinized with caution,” and he may rely solely on powers the Constitution grants to him alone. Id. at 638.

To determine whether the President possesses the exclusive power of recognition the Court examines the Constitution’s text and structure, as well as precedent and history bearing on the question.

A

Recognition is a “formal acknowledgement” that a particular “entity possesses the qualifications for statehood” or “that a particular regime is the effective government of a state.” Restatement (Third) of Foreign Relations Law of the United States § 203, Comment a, p. 84 (1986). It may also involve the determination of a state’s territorial bounds. See 2 M. Whiteman, Digest of International Law § 1, p. 1 (1963) (Whiteman) (“[S]tates may recognize or decline to recognize territory as belonging to, or under the sovereignty of, or having been acquired or lost by, other states”). Recognition is often effected by an express “written or oral declaration.” 1 John Bassett Moore, Digest of International Law § 27, p. 73 (1906) (Moore). It may also be implied—for example, by concluding a bilateral treaty or by sending or receiving diplomatic agents. Id.; Ian Brownlie, Principles of Public International Law 93 (7th ed. 2008) (Brownlie).

Legal consequences follow formal recognition. Recognized sovereigns may sue in United States courts, see Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938), and may benefit from sovereign immunity when they are sued, see
National City Bank of N.Y. v. Republic of China, 348 U.S. 356, 358-59 (1955). The actions of a recognized sovereign committed within its own territory also receive deference in domestic courts under the act of state doctrine. See Oetjen v. Central Leather Co., 246 U.S. 297, 302-03 (1918). Recognition at international law, furthermore, is a precondition of regular diplomatic relations. 1 Moore § 27, at 72. Recognition is thus “useful, even necessary,” to the existence of a state. Id.

Despite the importance of the recognition power in foreign relations, the Constitution does not use the term “recognition,” either in Article II or elsewhere. The Secretary asserts that the President exercises the recognition power based on the Reception Clause, which directs that the President “shall receive Ambassadors and other public Ministers.” Art. II, § 3. As Zivotofsky notes, the Reception Clause received little attention at the Constitutional Convention. In fact, during the ratification debates, Alexander Hamilton claimed that the power to receive ambassadors was “more a matter of dignity than of authority,” a ministerial duty largely “without consequence.” The Federalist No. 69, p. 420 (Clinton Rossiter ed., 1961).

At the time of the founding, however, prominent international scholars suggested that receiving an ambassador was tantamount to recognizing the sovereignty of the sending state. . . . It is a logical and proper inference, then, that a Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations.

This in fact occurred early in the Nation’s history when President Washington recognized the French Revolutionary Government by receiving its ambassador. . . . As a result, the Reception Clause provides support, although not the sole authority, for the President’s power to recognize other nations.

The inference that the President exercises the recognition power is further supported by his additional Article II powers. It is for the President, “by and with the Advice and Consent of the Senate,” to “make Treaties, provided two thirds of the Senators present concur.” Art. II, § 2, cl. 2. In addition, “he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors” as well as “other public Ministers and Consuls.” Id.

As a matter of constitutional structure, these additional powers give the President control over recognition decisions. At international law, recognition may be effected by different means, but each means is dependent upon Presidential power. In addition to receiving an ambassador, recognition may occur on “the conclusion of a bilateral treaty,” or the “formal initiation of diplomatic relations,” including the dispatch of an ambassador. Brownlie 93; see also 1 Moore § 27, at 73. The President has the sole power to negotiate treaties, see United States v.
The text and structure of the Constitution grant the President the power to recognize foreign nations and governments. The question then becomes whether that power is exclusive. The various ways in which the President may unilaterally effect recognition—and the lack of any similar power vested in Congress—suggest that it is. So, too, do functional considerations. Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not. Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received; whether their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights. These assurances cannot be equivocal.

Recognition is a topic on which the Nation must “‘speak . . . with one voice.’” Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 424 (2003) (quoting Crosby v. National Foreign Trade Council, 530 U.S. 363, 381 (2000)). That voice must be the President’s. Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, “[d]ecision, activity, secrecy, and dispatch.” The Federalist No. 70, p. 424 (A. Hamilton). The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition. See, e.g., United States v. Pink, 315 U.S. 203, 229 (1942). He is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law. 1 Oppenheim’s International Law §50, p. 169 (R. Jennings & A. Watts eds., 9th ed. 1992) (act of recognition must “leave no doubt as to the intention to grant it”). These qualities explain why the Framers listed the traditional avenues of recognition—receiving ambassadors, making treaties, and sending ambassadors—as among the President’s Article II powers.
As described in more detail below, the President since the founding has exercised this unilateral power to recognize new states—and the Court has endorsed the practice. Texts and treatises on international law treat the President’s word as the final word on recognition. . . . In light of this authority all six judges who considered this case in the Court of Appeals agreed that the President holds the exclusive recognition power.

It remains true, of course, that many decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action. Congress may “regulate Commerce with foreign Nations,” “establish an uniform Rule of Naturalization,” “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,” “declare War,” “grant Letters of Marque and Reprisal,” and “make Rules for the Government and Regulation of the land and naval Forces.” U.S. Const., Art. I, § 8. In addition, the President cannot make a treaty or appoint an ambassador without the approval of the Senate. Art. II, § 2, cl. 2. The President, furthermore, could not build an American Embassy abroad without congressional appropriation of the necessary funds. Art. I, § 8, cl. 1. Under basic separation-of-powers principles, it is for the Congress to enact the laws, including “all Laws which shall be necessary and proper for carrying into Execution” the powers of the Federal Government. § 8, cl. 18.

In foreign affairs, as in the domestic realm, the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” Youngstown, 343 U.S. at 635 (Jackson, J., concurring). Although the President alone effects the formal act of recognition, Congress’ powers, and its central role in making laws, give it substantial authority regarding many of the policy determinations that precede and follow the act of recognition itself. If Congress disagrees with the President’s recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress.

In practice, then, the President’s recognition determination is just one part of a political process that may require Congress to make laws. The President’s exclusive recognition power encompasses the authority to acknowledge, in a formal sense, the legitimacy of other states and governments, including their territorial bounds. Albeit limited, the exclusive recognition power is essential to the conduct of Presidential duties. The formal act of recognition is an executive power that Congress may not qualify. If the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question.
A clear rule that the formal power to recognize a foreign government subsists in the President therefore serves a necessary purpose in diplomatic relations. All this, of course, underscores that Congress has an important role in other aspects of foreign policy, and the President may be bound by any number of laws Congress enacts. In this way ambition counters ambition, ensuring that the democratic will of the people is observed and respected in foreign affairs as in the domestic realm. See The Federalist No. 51, p. 322 (J. Madison).

B

No single precedent resolves the question whether the President has exclusive recognition authority and, if so, how far that power extends. In part that is because, until today, the political branches have resolved their disputes over questions of recognition. The relevant cases, though providing important instruction, address the division of recognition power between the Federal Government and the States, see, e.g., Pink, 315 U.S. 203, or between the courts and the political branches, see, e.g., Banco Nacional de Cuba, 376 U.S. at 412, not between the President and Congress. As the parties acknowledge, some isolated statements in those cases lend support to the position that Congress has a role in the recognition process. In the end, however, a fair reading of the cases shows that the President’s role in the recognition process is both central and exclusive...

[D]uring the 1930’s and 1940’s, the Court addressed issues surrounding President Roosevelt’s decision to recognize the Soviet Government of Russia. In United States v. Belmont, 301 U.S. 324 (1937), and Pink, 315 U.S. 203, New York state courts declined to give full effect to the terms of executive agreements the President had concluded in negotiations over recognition of the Soviet regime. In particular the state courts, based on New York public policy, did not treat assets that had been seized by the Soviet Government as property of Russia and declined to turn those assets over to the United States. The Court stated that it “may not be doubted” that “recognition, establishment of diplomatic relations, . . . and agreements with respect thereto” are “within the competence of the President.” Belmont, 301 U.S. at 330. In these matters, “the Executive ha[s] authority to speak as the sole organ of th[e] government.” Id. The Court added that the President’s authority “is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition.” Pink, supra at 229 . . . . Thus, New York state courts were required to respect the executive agreements.

It is true, of course, that Belmont and Pink are not direct holdings that the recognition power is exclusive. Those cases considered the validity of executive agreements, not the initial act of recognition. The President’s determination in those cases did not contradict an Act of Congress. And the primary issue was whether the
executive agreements could supersede state law. Still, the language in *Pink* and *Belmont*, which confirms the President’s competence to determine questions of recognition, is strong support for the conclusion that it is for the President alone to determine which foreign governments are legitimate.

*Banco Nacional de Cuba* contains even stronger statements regarding the President’s authority over recognition. There, the status of Cuba’s Government and its acts as a sovereign were at issue. As the Court explained, “Political recognition is exclusively a function of the Executive.” 376 U.S. at 410. Because the Executive had recognized the Cuban Government, the Court held that it should be treated as sovereign and could benefit from the “act of state” doctrine. . . . As these cases illustrate, the Court has long considered recognition to be the exclusive prerogative of the Executive.

The Secretary now urges the Court to define the executive power over foreign relations in even broader terms. He contends that under the Court’s precedent the President has “exclusive authority to conduct diplomatic relations,” along with “the bulk of foreign-affairs powers.” Brief for Respondent 18, 16. In support of his submission that the President has broad, undefined powers over foreign affairs, the Secretary quotes *United States v. Curtiss-Wright Export Corp.*, which described the President as “the sole organ of the federal government in the field of international relations.” 299 U.S. at 320. This Court declines to acknowledge that unbounded power. A formulation broader than the rule that the President alone determines what nations to formally recognize as legitimate—and that he consequently controls his statements on matters of recognition—presents different issues and is unnecessary to the resolution of this case. . . .

Th[e] description of the President’s exclusive power [in *Curtiss-Wright*] was not necessary to the holding . . .—which, after all, dealt with congressionally authorized action, not a unilateral Presidential determination. Indeed, *Curtiss-Wright* did not hold that the President is free from Congress’ lawmaking power in the field of international relations. The President does have a unique role in communicating with foreign governments, as then-Congressman John Marshall acknowledged. But whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law.

In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation’s course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. . . . It is not for the President alone to determine the whole content of the Nation’s foreign policy.
That said, judicial precedent and historical practice teach that it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate, both for the Nation as a whole and for the purpose of making his own position clear within the context of recognition in discussions and negotiations with foreign nations. Recognition is an act with immediate and powerful significance for international relations, so the President’s position must be clear. Congress cannot require him to contradict his own statement regarding a determination of formal recognition.

C

Having examined the Constitution’s text and this Court’s precedent, it is appropriate to turn to accepted understandings and practice. In separation-of-powers cases this Court has often “put significant weight upon historical practice.” NLRB v. Noel Canning, 134 S. Ct. 2550, 2559 (2014) (emphasis deleted). Here, history is not all on one side, but on balance it provides strong support for the conclusion that the recognition power is the President’s alone. As Zivotofsky argues, certain historical incidents can be interpreted to support the position that recognition is a shared power. But the weight of historical evidence supports the opposite view, which is that the formal determination of recognition is a power to be exercised only by the President.

Even a brief survey of the major historical examples, with an emphasis on those said to favor Zivotofsky, establishes no more than that some Presidents have chosen to cooperate with Congress, not that Congress itself has exercised the recognition power.

From the first Administration forward, the President has claimed unilateral authority to recognize foreign sovereigns. For the most part, Congress has acquiesced in the Executive’s exercise of the recognition power. On occasion, the President has chosen, as may often be prudent, to consult and coordinate with Congress.

The first debate over the recognition power arose in 1793, after France had been torn by revolution. Once the Revolutionary Government was established, Secretary of State Jefferson and President Washington, without consulting Congress, authorized the American Ambassador to resume relations with the new regime. Soon thereafter, the new French Government proposed to send an ambassador, Citizen Genet, to the United States. Members of the President’s Cabinet agreed that receiving Genet would be a binding and public act of recognition. They decided, however, both that Genet should be received and that consultation with Congress was not necessary. Congress expressed no disagreement.
with this position, and Genet’s reception marked the Nation’s first act of recognition—one made by the President alone.

The recognition power again became relevant when yet another revolution took place—this time, in South America, as several colonies rose against Spain. In 1818, Speaker of the House Henry Clay announced he “intended moving the recognition of Buenos Ayres and probably of Chile.” Julius Goebel, The Recognition Policy of the United States 121 (1915) (Goebel). Clay thus sought to appropriate money “[f]or one year’s salary” for “a Minister” to present-day Argentina. 32 Annals of Cong. 1500 (1818). President Monroe, however, did not share that view. Although Clay gave “one of the most remarkable speeches of his career,” his proposed bill was defeated. Goebel 123; 32 Annals of Cong. 1655. That action has been attributed, in part, to the fact that Congress agreed the recognition power rested solely with the President. Goebel 124. Four years later, after the President had decided to recognize the South American republics, Congress did pass a resolution, on his request, appropriating funds for “such missions to the independent nations on the American continent, as the President of the United States may deem proper.” Act of May 4, 1822, ch. 52, 3 Stat. 678.

A decade later, President Jackson faced a recognition crisis over Texas. In 1835, Texas rebelled against Mexico and formed its own government. See Goebel 144-47. But the President feared that recognizing the new government could ignite a war. After Congress urged him to recognize Texas, the President delivered a message to the Legislature. He concluded there had not been a “deliberate inquiry” into whether the President or Congress possessed the recognition power. He stated, however, “on the ground of expediency, I am disposed to concur” with Congress’ preference regarding Texas. In response Congress appropriated funds for a “diplomatic agent to be sent to the Republic of Texas, whenever the President of the United States . . . shall deem it expedient to appoint such minister.” Act of Mar. 3, 1837, 5 Stat. 170. Thus, although he cooperated with Congress, the President was left to execute the formal act of recognition.

President Lincoln, too, sought to coordinate with Congress when he requested support for his recognition of Liberia and Haiti. In his first annual message to Congress he said he could see no reason “why we should persevere longer in withholding our recognition of the independence and sovereignty of Hayti and Liberia.” Lincoln’s First Annual Message to Congress (Dec. 3, 1861), in 6 Messages and Papers of the Presidents 44, 47. Nonetheless, he was “[u]nwilling” to “inaugurate a novel policy in regard to them without the approbation of Congress.” Id. In response Congress concurred in the President’s recognition determination and enacted a law appropriating funds to appoint diplomatic representatives to the two countries—leaving, as usual, the actual dispatch of ambassadors and formal statement of recognition to the President. Act of June 5, 1862, 12 Stat. 421.
Three decades later, the branches again were able to reach an accord, this time with regard to Cuba. In 1898, an insurgency against the Spanish colonial government was raging in Cuba. President McKinley determined to ask Congress for authorization to send armed forces to Cuba to help quell the violence. Although McKinley thought Spain was to blame for the strife, he opposed recognizing either Cuba or its insurgent government. At first, the House proposed a resolution consistent with McKinley’s wishes. The Senate countered with a resolution that authorized the use of force but that did recognize both Cuban independence and the insurgent government. When the Senate’s version reached the House, the House again rejected the language recognizing Cuban independence. The resolution went to Conference, which, after debate, reached a compromise. The final resolution stated “the people of the Island of Cuba are, and of right ought to be, free and independent,” but made no mention of recognizing a new Cuban Government. Act of Apr. 20, 1898, 30 Stat. 738. Accepting the compromise, the President signed the joint resolution.

For the next 80 years, “[P]residents consistently recognized new states and governments without any serious opposition from, or activity in, Congress.” Id.; see 2 Whiteman §§ 6-60, at 133-242 (detailing over 50 recognition decisions made by the Executive). The next debate over recognition did not occur until the late 1970’s. It concerned China.

President Carter recognized the People’s Republic of China (PRC) as the government of China, and derecognized the Republic of China, located on Taiwan. As to the status of Taiwan, the President “acknowledge[d] the Chinese position” that “Taiwan is part of China,” but he did not accept that claim. The President proposed a new law defining how the United States would conduct business with Taiwan. After extensive revisions, Congress passed, and the President signed, the Taiwan Relations Act, 93 Stat. 14 (1979). The Act (in a simplified summary) treated Taiwan as if it were a legally distinct entity from China—an entity with which the United States intended to maintain strong ties.

Throughout the legislative process, however, no one raised a serious question regarding the President’s exclusive authority to recognize the PRC—or to decline to grant formal recognition to Taiwan. Rather, Congress accepted the President’s recognition determination as a completed, lawful act; and it proceeded to outline the trade and policy provisions that, in its judgment, were appropriate in light of that decision.

This history confirms the Court’s conclusion in the instant case that the power to recognize or decline to recognize a foreign state and its territorial bounds resides in the President alone. For the most part, Congress has respected the
Executive’s policies and positions as to formal recognition. At times, Congress itself has defended the President’s constitutional prerogative. Over the last 100 years, there has been scarcely any debate over the President’s power to recognize foreign states. In this respect the Legislature, in the narrow context of recognition, on balance has acknowledged the importance of speaking “with one voice.” Crosby, 530 U.S. at 381. The weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency.

III

As the power to recognize foreign states resides in the President alone, the question becomes whether § 214(d) infringes on the Executive’s consistent decision to withhold recognition with respect to Jerusalem . . . .

Section 214(d) requires that, in a passport or consular report of birth abroad, “the Secretary shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel” for a “United States citizen born in the city of Jerusalem.” That is, § 214(d) requires the President, through the Secretary, to identify citizens born in Jerusalem who so request as being born in Israel. But according to the President, those citizens were not born in Israel. As a matter of United States policy, neither Israel nor any other country is acknowledged as having sovereignty over Jerusalem. In this way, § 214(d) “directly contradicts” the “carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem.” Zivotofsky v. Secretary of State 725 F.3d 197, 216, 217 (D.C. Cir. 2013).

If the power over recognition is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent’s statements. This conclusion is a matter of both common sense and necessity. If Congress could command the President to state a recognition position inconsistent with his own, Congress could override the President’s recognition determination. Under international law, recognition may be effected by “written or oral declaration of the recognizing state.” 1 Moore § 27, at 73. In addition an act of recognition must “leave no doubt as to the intention to grant it.” 1 Oppenheim’s International Law § 50, at 169. Thus, if Congress could alter the President’s statements on matters of recognition or force him to contradict them, Congress in effect would exercise the recognition power.

As Justice Jackson wrote in Youngstown, when a Presidential power is “exclusive,” it “disab[les] the Congress from acting upon the subject.” 343 U.S. at 637-38. Here, the subject is quite narrow: The Executive’s exclusive power extends
no further than his formal recognition determination. But as to that determination, Congress may not enact a law that directly contradicts it. This is not to say Congress may not express its disagreement with the President in myriad ways. For example, it may enact an embargo, decline to confirm an ambassador, or even declare war. But none of these acts would alter the President’s recognition decision.

If Congress may not pass a law, speaking in its own voice, that effects formal recognition, then it follows that it may not force the President himself to contradict his earlier statement. That congressional command would not only prevent the Nation from speaking with one voice but also prevent the Executive itself from doing so in conducting foreign relations.

Although the statement required by § 214(d) would not itself constitute a formal act of recognition, it is a mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State. As a result, it is unconstitutional. This is all the more clear in light of the longstanding treatment of a passport’s place-of-birth section as an official executive statement implicating recognition. The Secretary’s position on this point has been consistent: He will not place information in the place-of-birth section of a passport that contradicts the President’s recognition policy. If a citizen objects to the country listed as sovereign over his place of birth, then the Secretary will accommodate him by listing the city or town of birth rather than the country. But the Secretary will not list a sovereign that contradicts the President’s recognition policy in a passport. Thus, the Secretary will not list “Israel” in a passport as the country containing Jerusalem.

The flaw in § 214(d) is further underscored by the undoubted fact that that the purpose of the statute was to infringe on the recognition power—a power the Court now holds is the sole prerogative of the President. The statute is titled “United States Policy with Respect to Jerusalem as the Capital of Israel.” The House Conference Report proclaimed that § 214 “contains four provisions related to the recognition of Jerusalem as Israel’s capital.” H. R. Conf. Rep. No. 107-671, p. 123 (2002). And, indeed, observers interpreted § 214 as altering United States policy regarding Jerusalem—which led to protests across the region. From the face of § 214, from the legislative history, and from its reception, it is clear that Congress wanted to express its displeasure with the President’s policy by, among other things, commanding the Executive to contradict his own, earlier stated position on Jerusalem. This Congress may not do.

It is true, as Zivotofsky notes, that Congress has substantial authority over passports. The Court does not question the power of Congress to enact passport legislation of wide scope. . . .
The problem with § 214(d), however, lies in how Congress exercised its authority over passports. . . . To allow Congress to control the President’s communication in the context of a formal recognition determination is to allow Congress to exercise that exclusive power itself. As a result, the statute is unconstitutional.

JUSTICE BREYER, concurring:

I continue to believe that this case presents a political question inappropriate for judicial resolution. See Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012) (Breyer, J., dissenting). But because precedent precludes resolving this case on political question grounds, I join the Court’s opinion.

JUSTICE THOMAS, concurring in the judgment in part and dissenting in part . . .

[T]he Vesting Clause of Article II provides that “[t]he executive Power shall be vested in a President of the United States.” Art. II, § 1. This Clause is notably different from the Vesting Clause of Article I, which provides only that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,” Art. I, § 1 (emphasis added). By omitting the words “herein granted” in Article II, the Constitution indicates that the “executive Power” vested in the President is not confined to those powers expressly identified in the document. Instead, it includes all powers originally understood as falling within the “executive Power” of the Federal Government . . .

The statutory provision at issue implicates the President’s residual foreign affairs power. Section 214(d) instructs the Secretary of State, upon request of a citizen born in Jerusalem (or that citizen’s legal guardian), to list that citizen’s place of birth as Israel on his passport and consular report of birth abroad, even though it is the undisputed position of the United States that Jerusalem is not a part of Israel. The President argues that this provision violates his foreign affairs powers generally and his recognition power specifically. Zivotofsky rejoins that Congress passed § 214(d) pursuant to its enumerated powers and its action must therefore take precedence.

Neither has it quite right. The President is not constitutionally compelled to implement § 214(d) as it applies to passports because passport regulation falls squarely within his residual foreign affairs power and Zivotofsky has identified no source of congressional power to require the President to list Israel as the place of birth for a citizen born in Jerusalem on that citizen’s passport. Section 214(d) can, however, be constitutionally applied to consular reports of birth abroad because
those documents do not fall within the President’s foreign affairs authority but do fall within Congress’ enumerated powers over naturalization.2

In the Anglo-American legal tradition, passports have consistently been issued and controlled by the body exercising executive power—in England, by the King; in the colonies, by the Continental Congress; and in the United States, by President Washington and every President since. . . .

That the President has the power to regulate passports under his residual foreign affairs powers does not, however, end the matter, for Congress has repeatedly legislated on the subject of passports. . . .

As with any congressional action, however, such legislation is constitutionally permissible only insofar as it is promulgated pursuant to one of Congress’ enumerated powers. I must therefore address whether Congress had constitutional authority to enact § 214(d)’s regulation of passports. . . .

The Constitution contains no Passport Clause, nor does it explicitly vest Congress with “plenary authority over passports.” Because our Government is one of enumerated powers, “Congress has no power to act unless the Constitution authorizes it to do so.” United States v. Comstock, 560 U.S. 126, 159 (2010) (Thomas, J., dissenting). And “[t]he Constitution plainly sets forth the ‘few and defined’ powers that Congress may exercise.” Ibid. A “passport power” is not one of them.

Section 214(d)’s passport directive fares no better under those powers actually included in Article I. To start, it does not fall within the power “[t]o regulate Commerce with foreign Nations.” “At the time the original Constitution was ratified, ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes.” United States v. Lopez, 514 U.S. 549, 585 (1995) (Thomas, J., concurring). The listing of the place of birth of an applicant—whether born in Jerusalem or not—does not involve selling, buying, bartering, or transporting for those purposes.

True, a passport is frequently used by persons who may intend to engage in commerce abroad, but that use is insufficient to bring § 214(d)’s passport directive

2 The majority asserts that Zivotofsky “waived any argument that his consular report of birth abroad should be treated differently than his passport in the court below has pressed his claim that he is entitled to have his place of birth listed as “Israel” on both his passport and his consular report of birth abroad, and the consular report issue is fairly included in the question presented. Parties cannot waive the correct interpretation of the law simply by failing to invoke it. That the parties have argued the case as if the same analysis should apply to both documents does not relieve this Court of its responsibility to interpret the law correctly.
within the scope of this power. The specific conduct at issue here—the listing of the birthplace of a U.S. citizen born in Jerusalem on a passport by the President—is not a commercial activity. Any commercial activities subsequently undertaken by the bearer of a passport are yet further removed from that regulation.

The power “[t]o establish an uniform Rule of Naturalization” is similarly unavailing. At the founding, the word “naturalization” meant “[t]he act of investing aliens with the privileges of native subjects.” 2 S. Johnson, A Dictionary of the English Language 1293 (4th ed. 1773). A passport has never been issued as part of the naturalization process. It is—and has always been—a “travel document,” Dept. of State, 7 Foreign Affairs Manual (or FAM) §1311(b) (2013), issued for the same purpose it has always served: a request from one sovereign to another for the protection of the bearer.

For similar reasons, the Necessary and Proper Clause gives Congress no authority here. That Clause provides, “The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. Const., Art. I, § 8, cl. 18. As an initial matter, “Congress lacks authority to legislate [under this provision] if the objective is anything other than ‘carrying into Execution’ one or more of the Federal Government’s enumerated powers.” Comstock, supra, at 161 (Thomas, J., dissenting). . . .

But even if the objective of a law is carrying into execution one of the Federal Government’s enumerated powers, the law must be both necessary and proper to that objective. The “Clause is not a warrant to Congress to enact any law that bears some conceivable connection to the exercise of an enumerated power.” Gonzales v. Raich, 545 U.S. 1, 60 (2005) (Thomas, J., dissenting). Instead, “there must be a necessary and proper fit between the ‘means’ (the federal law) and the ‘end’ (the enumerated power or powers) it is designed to serve.” Comstock, supra, at 160 (Thomas, J., dissenting). The “means” chosen by Congress “will be deemed ‘necessary’ if they are ‘appropriate’ and ‘plainly adapted’ to the exercise of an enumerated power, and ‘proper’ if they are not otherwise ‘prohibited’ by the Constitution and not ‘[in]consistent’ with its ‘letter and spirit.’” Id. at 160-61 (alteration in original).

The argument that § 214(d), as applied to passports, could be an exercise of Congress’ power to carry into execution its foreign commerce or naturalization powers falters because this aspect of § 214(d) is directed at neither of the ends served by these powers. Although at a high level of generality, a passport could be related to foreign commerce and naturalization, that attenuated relationship is insufficient. The law in question must be “directly link[ed]” to the enumerated
power. *Id.* at 169 n. 8. As applied to passports, § 214(d) fails that test because it does not “‘carr[y] into Execution’” Congress’ foreign commerce or naturalization powers. *Id.* at 160. At most, it bears a tertiary relationship to an activity Congress is permitted to regulate: It directs the President’s formulation of a document, which, in turn, may be used to facilitate travel, which, in turn, may facilitate foreign commerce. And the distinctive history of the passport as a travel rather than citizenship document makes its connection to naturalization even more tenuous.

Nor can this aspect of § 214(d) be justified as an exercise of Congress’ power to enact laws to carry into execution the President’s residual foreign affairs powers. Simply put, § 214(d)’s passport directive is not a “proper” means of carrying this power into execution.

. . . . First, a law could be “improper” if it purports to direct another branch’s exercise of its power. Second, a law could be “improper” if it takes one of those actions and the branch to which the power is allocated objects to the action. . . .

I need not resolve that question today, as the application of § 214(d) to passports would be improper under either approach. The President has made a determination that the “place of birth” on a passport should list the country of present sovereignty. And the President has determined that no country is presently exercising sovereignty over the area of Jerusalem. Thus, the President has provided that passports for persons born in Jerusalem should list “Jerusalem” as the place of birth in the passport. Section 214(d) directs the President to exercise his power to issue and regulate the content of passports in a particular way, and the President has objected to that direction. Under either potential mechanism for evaluating the propriety of a law under the separation-of-powers limitation, this law would be improper. . . .

Because the President has residual foreign affairs authority to regulate passports and because there appears to be no congressional power that justifies § 214(d)’s application to passports, Zivotofsky’s challenge to the Executive’s designation of his place of birth on his passport must fail.

Although the consular report of birth abroad shares some features with a passport, it is historically associated with naturalization, not foreign affairs. In order to establish a “uniform Rule of Naturalization,” Congress must be able to identify the categories of persons who are eligible for naturalization, along with the rules for that process. Congress thus has always regulated the “acquisition of citizenship by being born abroad of American parents . . . in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization.” *United States v. Wong Kim Ark*, 169 U.S. 649, 688 (1898). It has determined that children born
abroad to U.S. parents, subject to some exceptions, are natural-born citizens who do not need to go through the naturalization process.

The consular report of birth abroad is well suited to carrying into execution the power conferred on Congress in the Naturalization Clause. The report developed in response to Congress’ requirement that children born abroad to U.S. citizens register with the consulate or lose their citizenship. And it continues to certify the acquisition of U.S. citizenship at birth by a person born abroad to a U.S. citizen.

Although registration is no longer required to maintain birthright citizenship, the consular report of birth abroad remains the primary means by which children born abroad may obtain official acknowledgement of their citizenship. Once acknowledged as U.S. citizens, they need not pursue the naturalization process to obtain the rights and privileges of citizenship in this country. Regulation of the report is thus “appropriate” and “plainly adapted” to the exercise of the naturalization power.

By contrast, regulation of the report bears no relationship to the President’s residual foreign affairs power. It has no historical pedigree uniquely associated with the President, contains no communication directed at a foreign power, and is primarily used for domestic purposes. To the extent that a citizen born abroad seeks a document to use as evidence of his citizenship abroad, he must obtain a passport.

Because regulation of the consular report of birth abroad is justified as an exercise of Congress’ powers under the Naturalization and Necessary and Proper Clauses and does not fall within the President’s foreign affairs powers, § 214(d)’s treatment of that document is constitutional.

The majority does not perform this analysis, but instead relies on a variation of the recognition power. That power is among the foreign affairs powers vested in the President by Article II’s Vesting Clause, as is confirmed by Article II’s express assignment to the President of the duty of receiving foreign Ambassadors, Art. II, § 3. But I cannot join the majority’s analysis because no act of recognition is implicated here.

Assuming for the sake of argument that listing a non-recognized foreign sovereign as a citizen’s place of birth on a U.S. passport could have the effect of recognizing that sovereign under international law, no such recognition would occur under the circumstances presented here. The United States has recognized Israel as a foreign sovereign since May 14, 1948. That the United States has subsequently declined to acknowledge Israel’s sovereignty over Jerusalem has not changed its recognition of Israel as a sovereign state. And even if the United States were to
acknowledge Israel’s sovereignty over Jerusalem, that action would not change its recognition of Israel as a sovereign state. That is because the United States has already afforded Israel the rights and responsibilities attendant to its status as a sovereign State. Taking a different position on the Jerusalem question will have no effect on that recognition.

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins, dissenting.

For our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs. In this case, the President claims the exclusive and preclusive power to recognize foreign sovereigns. The Court devotes much of its analysis to accepting the Executive’s contention. I have serious doubts about that position. The majority places great weight on the Reception Clause, which directs that the Executive “shall receive Ambassadors and other public Ministers.” Art. II, §3. But that provision, framed as an obligation rather than an authorization, appears alongside the duties imposed on the President by Article II, Section 3, not the powers granted to him by Article II, Section 2. Indeed, the People ratified the Constitution with Alexander Hamilton’s assurance that executive reception of ambassadors “is more a matter of dignity than of authority” and “will be without consequence in the administration of the government.” The Federalist No. 69, p. 420 (Clinton Rossiter ed., 1961).

The majority’s other asserted textual bases are even more tenuous. The President does have power to make treaties and appoint ambassadors. Art. II, § 2. But those authorities are shared with Congress, so they hardly support an inference that the recognition power is exclusive.

Precedent and history lend no more weight to the Court’s position. The majority cites dicta suggesting an exclusive executive recognition power, but acknowledges contrary dicta suggesting that the power is shared. When the best you can muster is conflicting dicta, precedent can hardly be said to support your side.

As for history, the majority admits that it too points in both directions. Some Presidents have claimed an exclusive recognition power, but others have expressed uncertainty about whether such preclusive authority exists. Those in the skeptical camp include Andrew Jackson and Abraham Lincoln, leaders not generally known for their cramped conceptions of Presidential power. Congress has also asserted its authority over recognition determinations at numerous points in history. The majority therefore falls short of demonstrating that “Congress has accepted” the President’s exclusive recognition power. In any event, we have held that congressional acquiescence is only “pertinent” when the President acts in the absence of express congressional authorization, not when he asserts power to
disregard a statute, as the Executive does here. Medellin, 552 U.S. at 528; see Dames & Moore, 453 U.S. at 678-79.

In sum, although the President has authority over recognition, I am not convinced that the Constitution provides the “conclusive and preclusive” power required to justify defiance of an express legislative mandate. Youngstown, 343 U.S. at 638 (Jackson, J., concurring). . . .

But even if the President does have exclusive recognition power, he still cannot prevail in this case, because the statute at issue does not implicate recognition. The relevant provision, § 214(d), simply gives an American citizen born in Jerusalem the option to designate his place of birth as Israel “[f]or purposes of” passports and other documents. The State Department itself has explained that “identification”—not recognition—“is the principal reason that U. S. passports require ‘place of birth.’” Congress has not disputed the Executive’s assurances that §214(d) does not alter the longstanding United States position on Jerusalem. And the annals of diplomatic history record no examples of official recognition accomplished via optional passport designation.

The majority acknowledges both that the “Executive’s exclusive power extends no further than his formal recognition determination” and that § 214(d) does “not itself constitute a formal act of recognition.” Taken together, these statements come close to a confession of error. The majority attempts to reconcile its position by reconceiving § 214(d) as a “mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State.” But as just noted, neither Congress nor the Executive Branch regards § 214(d) as a recognition determination, so it is hard to see how the statute could contradict any such determination.

At most, the majority worries that there may be a perceived contradiction based on a mistaken understanding of the effect of § 214(d), insisting that some “observers interpreted § 214 as altering United States policy regarding Jerusalem.” To afford controlling weight to such impressions, however, is essentially to subject a duly enacted statute to an international heckler’s veto.

Moreover, expanding the President’s purportedly exclusive recognition power to include authority to avoid potential misunderstandings of legislative enactments proves far too much. Congress could validly exercise its enumerated powers in countless ways that would create more severe perceived contradictions with Presidential recognition decisions than does § 214(d). If, for example, the President recognized a particular country in opposition to Congress’s wishes, Congress could declare war or impose a trade embargo on that country. A neutral observer might well conclude that these legislative actions had, to put it mildly,
created a perceived contradiction with the President’s recognition decision. And yet each of them would undoubtedly be constitutional. So too would statements by nonlegislative actors that might be seen to contradict the President’s recognition positions, such as the declaration in a political party platform that “Jerusalem is and will remain the capital of Israel.” Landler, Pushed by Obama, Democrats Alter Platform Over Jerusalem, N.Y. Times, Sept. 6, 2012, p. A14.

Ultimately, the only power that could support the President’s position is the one the majority purports to reject: the “exclusive authority to conduct diplomatic relations.” Brief for Respondent 18. The Government offers a single citation for this allegedly exclusive power: United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936). But as the majority rightly acknowledges, Curtiss-Wright did not involve a claim that the Executive could contravene a statute; it held only that he could act pursuant to a legislative delegation.

The expansive language in Curtiss-Wright casting the President as the “sole organ” of the Nation in foreign affairs certainly has attraction for members of the Executive Branch. The Solicitor General invokes the case no fewer than ten times in his brief. But our precedents have never accepted such a sweeping understanding of executive power. . . .

Just a few Terms ago, this Court rejected the President’s argument that a broad foreign relations power allowed him to override a state court decision that contradicted U. S. international law obligations. Medellin, 552 U.S. at 523-32. If the President’s so-called general foreign relations authority does not permit him to countermand a State’s lawful action, it surely does not authorize him to disregard an express statutory directive enacted by Congress, which—unlike the States—has extensive foreign relations powers of its own. Unfortunately, despite its protest to the contrary, the majority today allows the Executive to do just that.

Resolving the status of Jerusalem may be vexing, but resolving this case is not. Whatever recognition power the President may have, exclusive or otherwise, is not implicated by § 214(d). It has not been necessary over the past 225 years to definitively resolve a dispute between Congress and the President over the recognition power. Perhaps we could have waited another 225 years. But instead the majority strains to reach the question based on the mere possibility that observers overseas might misperceive the significance of the birthplace designation at issue in this case. And in the process, the Court takes the perilous step—for the first time in our history—of allowing the President to defy an Act of Congress in the field of foreign affairs. . . .

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE ALITO join, dissenting. . . .
Before turning to Presidential power under Article II, I think it well to establish the statute’s basis in congressional power under Article I. Congress’s power to “establish an uniform Rule of Naturalization,” Art. I, § 8, cl. 4, enables it to grant American citizenship to someone born abroad. United States v. Wong Kim Ark, 169 U.S. 649, 702-03 (1898). The naturalization power also enables Congress to furnish the people it makes citizens with papers verifying their citizenship—say a consular report of birth abroad (which certifies citizenship of an American born outside the United States) or a passport (which certifies citizenship for purposes of international travel). As the Necessary and Proper Clause confirms, every congressional power “carries with it all those incidental powers which are necessary to its complete and effectual execution.” Cohens v. Virginia, 19 U.S. 264, 429 (1821). Even on a miserly understanding of Congress’s incidental authority, Congress may make grants of citizenship “effectual” by providing for the issuance of certificates authenticating them.

One would think that if Congress may grant Zivotofsky a passport and a birth report, it may also require these papers to record his birthplace as “Israel.” The birthplace specification promotes the document’s citizenship-authenticating function by identifying the bearer, distinguishing people with similar names but different birthplaces from each other, helping authorities uncover identity fraud, and facilitating retrieval of the Government’s citizenship records. To be sure, recording Zivotovsky’s birthplace as “Jerusalem” rather than “Israel” would fulfill these objectives, but when faced with alternative ways to carry its powers into execution, Congress has the “discretion” to choose the one it deems “most beneficial to the people.” McCulloch v. Maryland, 17 U.S. 316, 421 (1819). It thus has the right to decide that recording birthplaces as “Israel” makes for better foreign policy. Or that regardless of international politics, a passport or birth report should respect its bearer’s conscientious belief that Jerusalem belongs to Israel.

No doubt congressional discretion in executing legislative powers has its limits; Congress’s chosen approach must be not only “necessary” to carrying its powers into execution, but also “proper.” Congress thus may not transcend boundaries upon legislative authority stated or implied elsewhere in the Constitution. But as we shall see, § 214(d) does not transgress any such restriction. . . .

The Court holds that the Constitution makes the President alone responsible for recognition and that § 214(d) invades this exclusive power. I agree that the Constitution empowers the President to extend recognition on behalf of the United States, but I find it a much harder question whether it makes that power exclusive. The Court tells us that “the weight of historical evidence” supports exclusive executive authority over “the formal determination of recognition.” But even with
its attention confined to formal recognition, the Court is forced to admit that "history is not all on one side." . . . Neither text nor history nor precedent yields a clear answer to these questions. Fortunately, I have no need to confront these matters today—nor does the Court—because § 214(d) plainly does not concern recognition.

Recognition is more than an announcement of a policy. Like the ratification of an international agreement or the termination of a treaty, it is a formal legal act with effects under international law. It signifies acceptance of an international status, and it makes a commitment to continued acceptance of that status and respect for any attendant rights. . . . In order to extend recognition, a state must perform an act that unequivocally manifests that intention. That act can consist of an express conferral of recognition, or one of a handful of acts that by international custom imply recognition—chiefly, entering into a bilateral treaty, and sending or receiving an ambassador.

To know all this is to realize at once that § 214(d) has nothing to do with recognition. Section 214(d) does not require the Secretary to make a formal declaration about Israel’s sovereignty over Jerusalem. And nobody suggests that international custom infers acceptance of sovereignty from the birthplace designation on a passport or birth report, as it does from bilateral treaties or exchanges of ambassadors. Recognition would preclude the United States (as a matter of international law) from later contesting Israeli sovereignty over Jerusalem. But making a notation in a passport or birth report does not encumber the Republic with any international obligations. It leaves the Nation free (so far as international law is concerned) to change its mind in the future. That would be true even if the statute required all passports to list “Israel.” But in fact it requires only those passports to list “Israel” for which the citizen (or his guardian) requests “Israel”; all the rest, under the Secretary’s policy, list “Jerusalem.” It is utterly impossible for this deference to private requests to constitute an act that unequivocally manifests an intention to grant recognition.

Section 214(d) performs a more prosaic function than extending recognition. Just as foreign countries care about what our Government has to say about their borders, so too American citizens often care about what our Government has to say about their identities. The State Department does not grant or deny recognition in order to accommodate these individuals, but it does make exceptions to its rules about how it records birthplaces. Although normal protocol requires specifying the bearer’s country of birth in his passport, the State Department will, if the bearer protests, specify the city of birth instead—so that an Irish nationalist may have his birthplace recorded as “Belfast” rather than “United Kingdom.” And although normal protocol requires specifying the country with present sovereignty over the bearer’s place of birth, a special exception allows a bearer born before 1948 in what
was then Palestine to have his birthplace listed as “Palestine.” Section 214(d) requires the State Department to make a further accommodation. Even though the Department normally refuses to specify a country that lacks recognized sovereignty over the bearer’s birthplace, it must suspend that policy upon the request of an American citizen born in Jerusalem. Granting a request to specify “Israel” rather than “Jerusalem” does not recognize Israel’s sovereignty over Jerusalem, just as granting a request to specify “Belfast” rather than “United Kingdom” does not derecognize the United Kingdom’s sovereignty over Northern Ireland.

The best indication that § 214(d) does not concern recognition comes from the State Department’s policies concerning Taiwan. According to the Solicitor General, the United States “acknowledges the Chinese position” that Taiwan is a part of China, but “does not take a position” of its own on that issue. Brief for Respondent 51-52. Even so, the State Department has for a long time recorded the birthplace of a citizen born in Taiwan as “China.” It indeed insisted on doing so until Congress passed a law (on which § 214(d) was modeled) giving citizens the option to have their birthplaces recorded as “Taiwan.” The Solicitor General explains that the designation “China” “involves a geographic description, not an assertion that Taiwan is . . . part of sovereign China.” Brief for Respondent 51-52. Quite so. Section 214(d) likewise calls for nothing beyond a “geographic description”; it does not require the Executive even to assert, never mind formally recognize, that Jerusalem is a part of sovereign Israel. Since birthplace specifications in citizenship documents are matters within Congress’s control, Congress may treat Jerusalem as a part of Israel when regulating the recording of birthplaces, even if the President does not do so when extending recognition.

The Court complains that § 214(d) requires the Secretary of State to issue official documents implying that Jerusalem is a part of Israel; that it appears in a section of the statute bearing the title “United States Policy with Respect to Jerusalem as the Capital of Israel”; and that foreign “observers interpreted [it] as altering United States policy regarding Jerusalem.” But these features do not show that § 214(d) recognizes Israel’s sovereignty over Jerusalem. They show only that the law displays symbolic support for Israel’s territorial claim. That symbolism may have tremendous significance as a matter of international diplomacy, but it makes no difference as a matter of constitutional law.

Even if the Constitution gives the President sole power to extend recognition, it does not give him sole power to make all decisions relating to foreign disputes over sovereignty. To the contrary, a fair reading of Article I allows Congress to decide for itself how its laws should handle these controversies. Read naturally, power to “regulate Commerce with foreign Nations,” § 8, cl. 3, includes power to regulate imports from Gibraltar as British goods or as Spanish goods. Read naturally, power to “regulate the Value . . . of foreign Coin,” § 8, cl. 5, includes
power to honor (or not) currency issued by Taiwan. And so on for the other enumerated powers.

The Constitution likewise does not give the President exclusive power to determine which claims to statehood and territory “are legitimate in the eyes of the United States.” Congress may express its own views about these matters by declaring war, restricting trade, denying foreign aid, and much else besides.

In the final analysis, the Constitution may well deny Congress power to recognize—the power to make an international commitment accepting a foreign entity as a state, a regime as its government, a place as a part of its territory, and so on. But whatever else § 214(d) may do, it plainly does not make (or require the President to make) a commitment accepting Israel’s sovereignty over Jerusalem.

The Court does not try to argue that § 214(d) extends recognition; nor does it try to argue that the President holds the exclusive power to make all nonrecognition decisions relating to the status of Jerusalem. As just shown, these arguments would be impossible to make with a straight face.

The Court instead announces a rule that is blatantly gerrymandered to the facts of this case. It concludes that, in addition to the exclusive power to make the “formal recognition determination,” the President holds an ancillary exclusive power “to control . . . formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds.” It follows, the Court explains, that Congress may not “requir[e] the President to contradict an earlier recognition determination in an official document issued by the Executive Branch.” So requiring imports from Jerusalem to be taxed like goods from Israel is fine, but requiring Customs to issue an official invoice to that effect is not? Nonsense.

Recognition is a type of legal act, not a type of statement. It is a leap worthy of the Mad Hatter to go from exclusive authority over making legal commitments about sovereignty to exclusive authority over making statements or issuing documents about national borders. The Court may as well jump from power over issuing declaratory judgments to a monopoly on writing law-review articles.

To the extent doubts linger about whether the United States recognizes Israel’s sovereignty over Jerusalem, § 214(d) leaves the President free to dispel them by issuing a disclaimer of intent to recognize. A disclaimer always suffices to prevent an act from effecting recognition. Restatement (Second) of Foreign Relations Law of the United States § 104(1) (1962). Recall that an earlier law grants citizens born in Taiwan the right to have their birthplaces recorded as “Taiwan.” The State Department has complied with the law, but states in its
Foreign Affairs Manual: “The United States does not officially recognize Taiwan as a ‘state’ or ‘country,’ although passport issuing officers may enter ‘Taiwan’ as a place of birth.” 7 FAM § 1300, App. D, § 1340(d)(6). Nothing stops a similar disclaimer here.

At other times, the Court seems concerned with Congress’s failure to give effect to a recognition decision that the President has already made. The Court protests, for instance, that § 214(d) “directly contradicts” the President’s refusal to recognize Israel’s sovereignty over Jerusalem. But even if the Constitution empowers the President alone to extend recognition, it nowhere obliges Congress to align its laws with the President’s recognition decisions. Because the President and Congress are “perfectly coordinate by the terms of their common commission,” The Federalist No. 49, p. 314 (Clinton Rossiter ed., 1961) (Madison), the President’s use of the recognition power does not constrain Congress’s use of its legislative powers.

The Court elsewhere objects that § 214(d) interferes with the autonomy and unity of the Executive Branch, setting the branch against itself. The Court suggests, for instance, that the law prevents the President from maintaining his neutrality about Jerusalem in “his and his agent’s statements.” That is of no constitutional significance. As just shown, Congress has power to legislate without regard to recognition, and where Congress has the power to legislate, the President has a duty to “take Care” that its legislation “be faithfully executed,” Art. II, § 3. It is likewise “the duty of the secretary of state to conform to the law”; where Congress imposes a responsibility on him, “he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.” Marbury v. Madison, 5 U.S. 137, 158, 166 (1803). The Executive’s involvement in carrying out this law does not affect its constitutionality; the Executive carries out every law.

The Court’s error could be made more apparent by applying its reasoning to the President’s power “to make Treaties,” Art. II, §2, cl. 2. There is no question that Congress may, if it wishes, pass laws that openly flout treaties made by the President. Head Money Cases, 112 U. S. 580, 597 (1884). Would anyone have dreamt that the President may refuse to carry out such laws—or, to bring the point closer to home, refuse to execute federal courts’ judgments under such laws—so that the Executive may “speak with one voice” about the country’s international obligations? To ask is to answer. Today’s holding puts the implied power to recognize territorial claims (which the Court infers from the power to recognize states, which it infers from the responsibility to receive ambassadors) on a higher footing than the express power to make treaties. And this, even though the Federalist describes the making of treaties as a “delicate and important prerogative,” but the reception of ambassadors as “more a matter of dignity than of authority,” “a
circumstance which will be without consequence in the administration of the government.” The Federalist No. 69, p. 420 (Hamilton).

In the end, the Court’s decision does not rest on text or history or precedent. It instead comes down to “functional considerations”—principally the Court’s perception that the Nation “must speak with one voice” about the status of Jerusalem. The vices of this mode of analysis go beyond mere lack of footing in the Constitution. Functionalism of the sort the Court practices today will systematically favor the unitary President over the plural Congress in disputes involving foreign affairs. It is possible that this approach will make for more effective foreign policy, perhaps as effective as that of a monarchy. It is certain that, in the long run, it will erode the structure of separated powers that the People established for the protection of their liberty.

On page 195, replace Note 10 with the following Notes on Zivotofsky v. Kerry:

10. In Zivotofsky II, the Court holds that (a) the President has a power of recognition, (b) this power is exclusive, and (c) Congress has infringed this power in Section 214(d). What materials or considerations does the Court invoke in support of each of these three conclusions? What provisions does the Court invoke from the constitutional text, and how does it read those provisions? What does the Court mean when it refers to the “constitutional structure”?

10a. In concluding that the President’s recognition power is exclusive, the Court relied on its own precedents and on the historical practices of the political branches.

As for precedents, the Court stated that “a fair reading of the cases shows that the President’s role in the recognition process is both central and exclusive.” Do you agree? Some of the cases imply that the recognition power is shared, and none involves an actual recognition dispute between the branches. In this light, what do you make of Chief Justice Roberts’ statement in dissent that “[w]hen the best you can muster is conflicting dicta, precedent can hardly be said to support your side”?

As for historical practice, the Court acknowledges that it was “not all on one side.” Did historical practice in fact establish that the President’s recognition power is exclusive? The Court observes that, “over the last 100 years, there has scarcely been any debate over the President’s power to recognize foreign states”? Does this lack of debate show, as the Court contends, that “Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency”? Or does it merely show that Congress has rarely
disagreed with the President’s recognition policy? Is Chief Justice Roberts right in asserting that congressional acquiescence should be relevant only when determining whether the President has authority to act in the absence of express congressional authorization, “not when [the President] asserts power to disregard a statute”? For additional discussion of the role of historical practice in *Zivotofsky II*, see Curtis A. Bradley, *Historical Gloss, the Recognition Power, and Judicial Review*, AJIL Unbound (forthcoming 2015).

10b. In support of its conclusion that “the President alone determines what nations to formally recognize as legitimate,” was it appropriate for the Court to take into account what it referred to as “functional considerations”? What are those considerations? Are they properly part of constitutional interpretation? Is Justice Scalia right that a reliance on such considerations will systematically favor executive authority?

10c. The Court contends that “the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not.” Assuming this is correct, why must the “single policy” be set by the President, rather than (in some instances) the Congress through the deliberative process of legislation? And assuming that the President should set the single policy, does the Court’s analysis in fact ensure that he will succeed? The Court emphasizes that Congress has substantial authority to regulate in the area of foreign affairs, and that “[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.” Under the Court’s analysis, what can Congress do if it disagrees with the President’s recognition policy? For example, can it pass trade, customs, or tax laws that conflict with such policy? Also, why is having one voice more important with respect to recognition than for other issues in foreign affairs? As Justice Scalia notes, for example, it is well settled that Congress can override a treaty for purposes of U.S. law (an issue covered in at pages 282-87 of the casebook)? If Congress can do that, why should it not be able to override a President’s recognition decision?

10d. What role does international law play in the Court’s decision? The Court makes a number of observations about international law: “[a]t international law, recognition may be effected by different means, but each means is dependent upon Presidential power”; the President “is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law”; and “[t]exts and treatises on international law treat the President’s word as the final word on recognition.” Are these features of international law relevant to interpreting the distribution of authority in the U.S. Constitution? What about the observation, made by both Justice Thomas and Justice Scalia, that Section 214(d) would not have changed U.S. recognition policy as a matter of international law?
10e. The Court says that “Congress cannot require [the President] to contradict his own statement regarding a determination of formal recognition.” Did Section 214(d) in fact require the President to do that? Would the “contradiction” have stemmed from how enforcement of Section 214(d) would have been perceived abroad? If so, should the constitutionality of legislation turn on foreign perceptions? Is Chief Justice Roberts right in asserting that “[t]o afford controlling weight to such impressions . . . is essentially to subject a duly enacted statute to an international heckler’s veto”? In any event, could the executive branch have prevented such perceptions by issuing a disclaimer, as Justice Scalia contends? (Note that, in concluding that Section 214(d) contradicts the executive branch’s recognition position, the Court quotes from the D.C. Circuit’s decision, which gave deference to the Secretary of State’s assessment that enforcing Section 214(d) would be perceived by the Palestinians and others as prejudging the status of Jerusalem.)

10f. Zivotofsky II is a rare instance in which the President is found to prevail under the third category of Justice Jackson’s framework from Youngstown. To what extent will the executive branch be able to invoke this decision as precedent in other controversies with Congress? Will this decision enhance presidential authority or serve to limit it? Commentators writing immediately after the decision were divided. Compare, for example, Michael Dorf, Zivotofsky May be Remembered as Limiting Exclusive Presidential Power (June 8, 2015), Dorf on Law, at http://www.dorfonlaw.org/2015/06/zivotofsky-may-be-remembered-as.html (“Although the case invalidates an Act of Congress as interfering with an exclusive presidential power, it may be remembered over the long term as a limit on exclusive presidential power (i.e., vindicating congressional power over foreign affairs).”), with Jack Goldsmith, Why Zivotofsky is a Significant Victory for the Executive Branch (June 8, 2015), Lawfare, at http://www.lawfareblog.com/why-zivotofsky-significant-victory-executive-branch (“This precedent thus gives executive branch lawyers much more powerful ammunition than before in deciding whether to disregard foreign relations statutes in contexts that never reach courts for review.”). See also, e.g., Michael J. Glennon, Recognizable Power: The Supreme Court Deals a Blow to Executive Authority, FOREIGN AFFAIRS SNAPSHOT (June 23, 2015), at https://www.foreignaffairs.com/articles/united-states/2015-06-23/recognizable-power.

10g. Consider the Court’s treatment of United States v. Curtiss-Wright Export Corp., a decision that is excerpted at pages 31-35 of the casebook. The Court distances itself from some of the broad presidential power rhetoric from that decision, and it makes clear that “[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.” Chief Justice Roberts’ dissent similarly criticizes the broad reasoning in Curtiss-Wright. On the other hand, the Court relies throughout its opinion on the functional
advantages of the executive branch in upholding presidential defiance of a statute that the Court thinks “would not only prevent the Nation from speaking with one voice but also prevent the Executive itself from doing so in conducting foreign relations.” Will Zivotofsky II now become a significant counterpoint to executive branch invocations of Curtiss-Wright, despite holding in favor of executive authority in this case? Or will Zivotofsky II become the new Curtiss-Wright, with the major difference that its pro-presidential one-voice rhetoric is not (as in Curtiss-Wright) extraneous to the holding of the case?

10h. The Court in Zivotofsky II accepts that “Congress has substantial authority over passports,” and it says that it “does not question the power of Congress to enact passport legislation of wide scope.” Why does it assume broad congressional power in this area? Because of historical practice? Justice Thomas, by contrast, contends that Congress lacked the authority to enact the passport regulation in Section 214(d). What is his view of Congress’s powers under the Commerce Clause, Naturalization Clause, and Necessary and Proper Clause? Justice Scalia takes issue with Thomas’s analysis. According to Scalia, what is the source of Congress’s authority to enact Section 214(d)? Is Thomas’s distinction between Section 214(d)’s regulation of passports and its regulation of consular report of births abroad persuasive?

10i. Only Justice Thomas relies on what has been called the Vesting Clause Thesis—that is, the claim that the first sentence of Article II of the Constitution (the “vesting clause”) is a source of residual presidential authority, including authority relating to foreign affairs. (This claim is discussed at pages 169-71 of the casebook. For an academic defense of it, see Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs, 111 Yale L.J. 231 (2001).) The majority in Zivotofsky states that, because a recognition power can be inferred from specific constitutional clauses, “the Court need not consider whether or to what extent the Vesting Clause, which provides that the ‘executive Power’ shall be vested in the President, provides further support for the President’s action here.” Does the majority’s willingness to make inferences about presidential authority from constitutional text reduce the need to search for residual presidential power? Cf. Curtis A. Bradley & Martin S. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 Mich. L. Rev. 545, 688 (2004) (“Neither the Vesting Clause Thesis, nor executive power essentialism, provide the only arguments that can be made for broad presidential power in foreign relations. It is arguable, for example, that the President’s delegated powers should be construed liberally to account for the changing and unanticipated responsibilities of his office. It is also arguable that the President has acquired constitutional powers not specified in Article II by virtue of the longstanding practices and interactions of the political branches.”).
10j. Justice Breyer joined the majority opinion but noted that he continued to believe that the case should have been dismissed under the political question doctrine. Does this decision illustrate a potential downside of narrowing the political question doctrine, at least from the perspective of those concerned about the growth of presidential power? After all, if the case had been dismissed, Congress would have remained free to assert that it had the constitutional authority to enact Section 214(d) and similar measures, whereas it has now lost that ability. In declining to apply the political question doctrine in the first Zivotofsky decision, the Court was very formalistic and declined to take into account prudential considerations that might have favored judicial abstention. The Court’s subsequent decision on the merits is much more pragmatic and functional in its approach. Might a formalistic approach to justiciability merely shift functional considerations to the merits stage of a case? See Curtis Bradley, Zivotofsky and Pragmatic Foreign Relations Law (June 9, 2015), ScotusBlog, at http://www.scotusblog.com/2015/06/symposium-zivotofsky-and-pragmatic-foreign-relations-law/ (noting this possibility).

10k. For additional discussion of U.S. historical practice relating to recognition, see Julius Goebel, The Recognition Policy of the United States (1915); Clarence Bergdahl, The Power of Recognition, 14 Am. J. Int’l L. 519 (1920); and Robert J. Reinstein, Is the President’s Recognition Power Exclusive?, 86 Temple L. Rev. 1 (2013). For additional commentary on Zivotofsky II, see the 2015 symposium in AJIL Unbound, with contributions from Curtis Bradley, Harlan Cohen, and Jean Galbraith.

Chapter 5: Treaties and Other International Agreements

On page 278, add the following at the end of Note 7:

See also Doe v. Holder, 763 F.3d 251, 257 (2d Cir. 2014) (reciting statements by both the executive branch and Congress suggesting that they viewed an article of a treaty as non-self-executing and noting that this was “a conclusion to which we are obligated to give great weight”); ESAB Group, Inc. v. Zurich Ins. PLC, 685 F.3d 376, 387 (4th Cir. 2012) (noting “an emerging presumption against finding treaties to be self-executing”).
On page 279, add the following at the end of Note 10:

See also Rebecca M. Kysar, On the Constitutionality of Tax Treaties, 38 Yale J. Int’l L. 1 (2013) (arguing that it is constitutionally problematic to treat tax treaties as self-executing because they directly affect government revenues without involving the House of Representatives, contrary to the constitutional requirement that “[a]ll Bills for raising Revenue shall originate in the House of Representatives”).

On page 293, insert the following opinion before the Notes and Questions:

**Bond v. United States**
134 S. Ct. 2077 (2014)

[In 1997, the United States ratified the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction. The Convention prohibits the development, stockpiling, or use of chemical weapons by any state party or person within a state party’s jurisdiction, and it defines “chemical weapons” as “[t]oxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes.” The “Purposes Not Prohibited Under this Convention” are defined as “[i]ndustrial, agricultural, research, medical, pharmaceutical or other peaceful purposes.” In 1998, Congress implemented the Convention by passing the Chemical Weapons Convention Implementation Act. The Act closely tracks the text of the treaty. Section 229 of the Act forbids any person knowingly “to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon.” The Act defines “chemical weapon” in relevant part as “[a] toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose.” “Toxic chemical” is in turn defined in general as “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.”

Carol Anne Bond is a microbiologist in Pennsylvania who worked for a chemical manufacturer there. In 2006, her closest friend, Myrlinda Haynes, announced that she was pregnant. Bond subsequently discovered that her own husband was the father of Haynes’ child. Seeking revenge against Haynes, Bond stole an arsenic-based compound (10-chloro-10H-phenoxarsine) from her employer and purchased on the Internet a vial of a chemical used in printing photographs and cleaning laboratory equipment (potassium dichromate). She then applied these chemicals
to surfaces around the outside of Haynes’ home, mailbox, and car in an effort to cause her injury. Haynes realized what was happening and generally avoided contact with the chemicals, although in one instance she received a minor contact burn on her thumb. The local police were slow to act, so Haynes eventually contacted federal authorities, and they proceeded to charge Bond with two counts of violating Section 229 of the Chemical Weapons Convention Implementation Act. She entered into a conditional plea bargain that accepted guilt while preserving her right to appeal, and she was sentenced to six years in prison. On appeal, she argued that the application of the Act to her conduct exceeded the federal government’s authority to regulate state and local matters, in violation of the Tenth Amendment to the Constitution. In 2011, the Supreme Court held that Bond had standing to raise this federalism argument. See Bond v. United States, 131 S. Ct. 2355 (2011) (Bond I). On remand, the U.S. Court of Appeals for the Third Circuit upheld her conviction, and she appealed again to the Supreme Court.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court. . . .

II

In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good—what we have often called a “police power.” United States v. Lopez, 514 U.S. 549, 567 (1995). The Federal Government, by contrast, has no such authority and “can exercise only the powers granted to it,” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819), including the power to make “all Laws which shall be necessary and proper for carrying into Execution” the enumerated powers, U.S. Const., Art. I, § 8, cl. 18. For nearly two centuries it has been “clear” that, lacking a police power, “Congress cannot punish felonies generally.” Cohens v. Virginia, 19 U.S. (6 Wheat.) 428 (1821). A criminal act committed wholly within a State “cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.” United States v. Fox, 95 U.S. 670, 672 (1878).

The Government frequently defends federal criminal legislation on the ground that the legislation is authorized pursuant to Congress’s power to regulate interstate commerce. In this case, however, the Court of Appeals held that the Government had explicitly disavowed that argument before the District Court. As a result, in this Court the parties have devoted significant effort to arguing whether section 229, as applied to Bond’s offense, is a necessary and proper means of executing the National Government’s power to make treaties. Bond argues that the lower court’s reading of Missouri v. Holland would remove all limits on
federal authority, so long as the Federal Government ratifies a treaty first. She insists that to effectively afford the Government a police power whenever it implements a treaty would be contrary to the Framers’ careful decision to divide power between the States and the National Government as a means of preserving liberty. To the extent that Holland authorizes such usurpation of traditional state authority, Bond says, it must be either limited or overruled.

The Government replies that this Court has never held that a statute implementing a valid treaty exceeds Congress’s enumerated powers. To do so here, the Government says, would contravene another deliberate choice of the Framers: to avoid placing subject matter limitations on the National Government’s power to make treaties. And it might also undermine confidence in the United States as an international treaty partner.

Notwithstanding this debate, it is “a well-established principle governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.” Escambia County v. McMillan, 466 U.S. 48, 51 (1984) (per curiam); see also Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Bond argues that section 229 does not cover her conduct. So we consider that argument first.

III

Section 229 exists to implement the Convention, so we begin with that international agreement. . . . [T]he Convention’s drafters intended for it to be a comprehensive ban on chemical weapons. But even with its broadly worded definitions, we have doubts that a treaty about chemical weapons has anything to do with Bond’s conduct. The Convention, a product of years of worldwide study, analysis, and multinational negotiation, arose in response to war crimes and acts of terrorism. There is no reason to think the sovereign nations that ratified the Convention were interested in anything like Bond’s common law assault.

Even if the treaty does reach that far, nothing prevents Congress from implementing the Convention in the same manner it legislates with respect to innumerable other matters—observing the Constitution’s division of responsibility between sovereigns and leaving the prosecution of purely local crimes to the States. The Convention, after all, is agnostic between enforcement at the state versus federal level: It provides that “[e]ach State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention.” Art. VII(1) (emphasis added) . . . .
Fortunately, we have no need to interpret the scope of the Convention in this case. Bond was prosecuted under section 229, and the statute—unlike the Convention—must be read consistent with principles of federalism inherent in our constitutional structure.

In the Government’s view, the conclusion that Bond “knowingly” “use[d]” a “chemical weapon” in violation of section 229(a) is simple: The chemicals that Bond placed on Haynes’s home and car are “toxic chemical[s]” as defined by the statute, and Bond’s attempt to assault Haynes was not a “peaceful purpose.” The problem with this interpretation is that it would “dramatically intrude[] upon traditional state criminal jurisdiction,” and we avoid reading statutes to have such reach in the absence of a clear indication that they do. United States v. Bass, 404 U.S. 336, 350 (1971).


Among the background principles of construction that our cases have recognized are those grounded in the relationship between the Federal Government and the States under our Constitution. It has long been settled, for example, that we presume federal statutes do not abrogate state sovereign immunity, Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985), impose obligations on the States pursuant to section 5 of the Fourteenth Amendment, Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 16-17 (1981), or preempt state law, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

Closely related to these is the well-established principle that “it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides” the “usual constitutional balance of federal and state powers.” Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quoting Atascadero, supra, at 243). To quote Frankfurter again, if the Federal Government would “radically readjust[ ] the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit” about it. BFP v. Resolution Trust Corporation, 511 U.S. 531, 544 (1994) (quoting Some Reflections, supra, at 539-40; second alteration in original). Or as explained by Justice Marshall, when legislation “affect[s] the federal balance, the requirement
of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” Bass, supra, at 349.

We have applied this background principle when construing federal statutes that touched on several areas of traditional state responsibility. . . . Perhaps the clearest example of traditional state authority is the punishment of local criminal activity. United States v. Morrison, 529 U.S. 598, 618 (2000). Thus, “we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.” Bass, 404 U.S. at 349. . . .

These precedents make clear that it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute. In this case, the ambiguity derives from the improbably broad reach of the key statutory definition given the term—“chemical weapon”—being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism. We conclude that, in this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute’s expansive language in a way that intrudes on the police power of the States. See Bass, supra, at 349.

We do not find any such clear indication in section 229. “Chemical weapon” is the key term that defines the statute’s reach, and it is defined extremely broadly. But that general definition does not constitute a clear statement that Congress meant the statute to reach local criminal conduct.

In fact, a fair reading of section 229 suggests that it does not have as expansive a scope as might at first appear. To begin, as a matter of natural meaning, an educated user of English would not describe Bond’s crime as involving a “chemical weapon.” Saying that a person “used a chemical weapon” conveys a very different idea than saying the person “used a chemical in a way that caused some harm.” The natural meaning of “chemical weapon” takes account of both the particular chemicals that the defendant used and the circumstances in which she used them.

When used in the manner here, the chemicals in this case are not of the sort that an ordinary person would associate with instruments of chemical warfare. . . . More to the point, the use of something as a “weapon” typically connotes “[a]n instrument of offensive or defensive combat,” Webster’s Third New International Dictionary 2589 (2002), or “[a]n instrument of attack or defense in combat, as a gun, missile, or sword,” American Heritage Dictionary 2022 (3d ed. 1992). But
no speaker in natural parlance would describe Bond’s feud-driven act of spreading irritating chemicals on Haynes’s door knob and mailbox as “combat.” Nor do the other circumstances of Bond’s offense—an act of revenge born of romantic jealousy, meant to cause discomfort, that produced nothing more than a minor thumb burn—suggest that a chemical weapon was deployed in Norristown, Pennsylvania. Potassium dichromate and 10-chloro-10H-phenoxarsine might be chemical weapons if used, say, to poison a city’s water supply. But Bond’s crime is worlds apart from such hypotheticals, and covering it would give the statute a reach exceeding the ordinary meaning of the words Congress wrote.

The Government would have us brush aside the ordinary meaning and adopt a reading of section 229 that would sweep in everything from the detergent under the kitchen sink to the stain remover in the laundry room. Yet no one would ordinarily describe those substances as “chemical weapons.” The Government responds that because Bond used “specialized, highly toxic” (though legal) chemicals, “this case presents no occasion to address whether Congress intended [section 229] to apply to common household substances.” Brief for United States 13, n. 3. That the statute would apply so broadly, however, is the inescapable conclusion of the Government’s position: Any parent would be guilty of a serious federal offense—possession of a chemical weapon—when, exasperated by the children’s repeated failure to clean the goldfish tank, he considers poisoning the fish with a few drops of vinegar. We are reluctant to ignore the ordinary meaning of “chemical weapon” when doing so would transform a statute passed to implement the international Convention on Chemical Weapons into one that also makes it a federal offense to poison goldfish.

In light of all of this, it is fully appropriate to apply the background assumption that Congress normally preserves “the constitutional balance between the National Government and the States.” Bond I, 131 S. Ct. at 2364. That assumption is grounded in the very structure of the Constitution. And as we explained when this case was first before us, maintaining that constitutional balance is not merely an end unto itself. Rather, “[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.” Ibid.

The Government’s reading of section 229 would “alter sensitive federal-state relationships,” convert an astonishing amount of “traditionally local criminal conduct” into “a matter for federal enforcement,” and “involve a substantial extension of federal police resources.” Bass, 404 U.S. at 349-50. It would transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. Of course Bond’s conduct is serious and unacceptable—and against the laws of Pennsylvania. But the background principle that Congress
does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond’s crime with a federal prosecution for a chemical weapons attack.

In fact, with the exception of this unusual case, the Federal Government itself has not looked to section 229 to reach purely local crimes. The Government has identified only a handful of prosecutions that have been brought under this section. Most of those involved either terrorist plots or the possession of extremely dangerous substances with the potential to cause severe harm to many people. . . . The Federal Government undoubtedly has a substantial interest in enforcing criminal laws against assassination, terrorism, and acts with the potential to cause mass suffering. Those crimes have not traditionally been left predominantly to the States, and nothing we have said here will disrupt the Government’s authority to prosecute such offenses.

It is also clear that the laws of the Commonwealth of Pennsylvania (and every other State) are sufficient to prosecute Bond. Pennsylvania has several statutes that would likely cover her assault. And state authorities regularly enforce these laws in poisoning cases.

The Government objects that Pennsylvania authorities charged Bond with only a minor offense based on her “harassing telephone calls and letters,” and declined to prosecute her for assault. But we have traditionally viewed the exercise of state officials’ prosecutorial discretion as a valuable feature of our constitutional system. And nothing in the Convention shows a clear intent to abrogate that feature. Prosecutorial discretion involves carefully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State. Here, in its zeal to prosecute Bond, the Federal Government has “displaced” the “public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign,” that Bond does not belong in prison for a chemical weapons offense.

As we have explained, “Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States.” *Bass*, 404 U.S. at 349. There is no clear indication of a contrary approach here. Section 229 implements the Convention, but Bond’s crime could hardly be more unlike the uses of mustard gas on the Western Front or nerve agents in the Iran-Iraq war that form the core concerns of that treaty. . . . [T]here are no apparent interests of the United States Congress or the community of nations in seeing Bond end up in federal prison, rather than dealt with (like virtually all other criminals in Pennsylvania) by the State. The Solicitor General acknowledged as much at oral argument. *See* Tr. of Oral Arg. 47 (“I don’t think anybody would say [that]
whether or not Ms. Bond is prosecuted would give rise to an international incident”).

This case is unusual, and our analysis is appropriately limited. Our disagreement with our colleagues reduces to whether section 229 is “utterly clear.” (Scalia, J., concurring in judgment). We think it is not, given that the definition of “chemical weapon” in a particular case can reach beyond any normal notion of such a weapon, that the context from which the statute arose demonstrates a much more limited prohibition was intended, and that the most sweeping reading of the statute would fundamentally upset the Constitution’s balance between national and local power. This exceptional convergence of factors gives us serious reason to doubt the Government’s expansive reading of section 229, and calls for us to interpret the statute more narrowly.

In sum, the global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboard, or to treat a local assault with a chemical irritant as the deployment of a chemical weapon. There is no reason to suppose that Congress—in implementing the Convention on Chemical Weapons—thought otherwise.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom JUSTICE ALITO joins as to Part I, concurring in the judgment.

I. The Statutory Question

The meaning of the Act is plain. No person may knowingly “develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon.” A “chemical weapon” is “[a] toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose.” A “toxic chemical” is “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.” A “purpose not prohibited” is “[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.”

Applying those provisions to this case is hardly complicated. Bond possessed and used “chemical[s] which through [their] chemical action on life processes can cause death, temporary incapacitation or permanent harm.” Thus, she possessed “toxic chemicals.” And, because they were not possessed or used
only for a “purpose not prohibited,” they were “chemical weapons.” Ergo, Bond violated the Act. End of statutory analysis, I would have thought.

The Court does not think the interpretive exercise so simple. But that is only because its result-driven antitextualism befogs what is evident. . . .

The Court starts with the federalism-related consequences of the statute’s meaning and reasons backwards, holding that, if the statute has what the Court considers a disruptive effect on the “federal-state balance” of criminal jurisdiction, that effect causes the text, even if clear on its face, to be ambiguous. . . . Imagine what future courts can do with that judge-empowering principle: Whatever has improbably broad, deeply serious, and apparently unnecessary consequences . . . is ambiguous! . . .

In this case, the ordinary meaning of the term being defined is irrelevant, because the statute’s own definition—however expansive—is utterly clear: any “chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals,” unless the chemical is possessed or used for a “peaceful purpose.” The statute parses itself. There is no opinion of ours, and none written by any court or put forward by any commentator since Aristotle, which says, or even suggests, that “dissonance” between ordinary meaning and the unambiguous words of a definition is to be resolved in favor of ordinary meaning. If that were the case, there would hardly be any use in providing a definition. . . .

I suspect the Act will not survive today’s gruesome surgery. A criminal statute must clearly define the conduct it proscribes. If it does not “give a person of ordinary intelligence fair notice” of its scope, United States v. Batchelder, 442 U.S. 114, 123 (1979), it denies due process.

The new § 229(a)(1) fails that test. Henceforward, a person “shall be fined . . ., imprisoned for any term of years, or both,”—or, if he kills someone, “shall be punished by death or imprisoned for life,”—whenever he “develop[s], produce[s], otherwise acquire[s], transfer[s] directly or indirectly, receive[s], stockpile[s], retain[s], own[s], possess[es], or use[s], or threaten[s] to use,” any chemical “of the sort that an ordinary person would associate with instruments of chemical warfare” (emphasis added). Whether that test is satisfied, the Court unhelpfully (and also illogically) explains, depends not only on the “particular chemicals that the defendant used” but also on “the circumstances in which she used them.” The “detergent under the kitchen sink” and “the stain remover in the laundry room” are apparently out—but what if they are deployed to poison a neighborhood water fountain? Poisoning a goldfish tank is also apparently out, but what if the fish belongs to a Congressman or Governor and the act is meant as a menacing
message, a small-time equivalent of leaving a severed horse head in the bed? . . . Moreover, the Court’s illogical embellishment seems to apply only to the “use” of a chemical, but “use” is only 1 of 11 kinds of activity that the statute prohibits. What, one wonders, makes something a “chemical weapon” when it is merely “stockpile[d]” or “possess[ed]?” To these questions and countless others, one guess is as bad as another.

No one should have to ponder the totality of the circumstances in order to determine whether his conduct is a felony. Yet that is what the Court will now require of all future handlers of harmful toxins—that is to say, all of us. Thanks to the Court’s revisions, the Act, which before was merely broad, is now broad and unintelligible. . . . Before long, I suspect, courts will be required to say so.

Since the Act is clear, the real question this case presents is whether the Act is constitutional as applied to petitioner. An unreasoned and citation-less sentence from our opinion in Missouri v. Holland, 252 U.S. 416 (1920), purported to furnish the answer: “If the treaty is valid”—and no one argues that the Convention is not—“there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government.” Id. at 432. Petitioner and her amici press us to consider whether there is anything to this ipse dixit. The Constitution’s text and structure show that there is not.

II. The Constitutional Question

Under Article I, § 8, cl. 18, Congress has the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” One such “other Power[r]” appears in Article II, § 2, cl. 2: “[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” Read together, the two Clauses empower Congress to pass laws “necessary and proper for carrying into Execution . . . [the] Power . . . to make Treaties.”

It is obvious what the Clauses, read together, do not say. They do not authorize Congress to enact laws for carrying into execution “Treaties,” even treaties that do not execute themselves, such as the Chemical Weapons Convention. Surely it makes sense, the Government contends, that Congress would have the power to carry out the obligations to which the President and the Senate have committed the Nation. The power to “carry into Execution” the “Power . . . to make Treaties,” it insists, has to mean the power to execute the treaties themselves. . . .
How might Congress have helped “carr[y]” the power to make the treaty—here, the Chemical Weapons Convention—“into Execution”? In any number of ways. It could have appropriated money for hiring treaty negotiators, empowered the Department of State to appoint those negotiators, formed a commission to study the benefits and risks of entering into the agreement, or paid for a bevy of spies to monitor the treaty-related deliberations of other potential signatories. . . .

But a power to help the President make treaties is not a power to implement treaties already made. See generally Nicholas Quinn Rosenkranz, Executing the Treaty Power, 118 Harv. L. Rev. 1867 (2005). Once a treaty has been made, Congress’s power to do what is “necessary and proper” to assist the making of treaties drops out of the picture. To legislate compliance with the United States’ treaty obligations, Congress must rely upon its independent (though quite robust) Article I, § 8, powers.

“[T]he Constitution confer[s] upon Congress . . . not all governmental powers, but only discrete, enumerated ones.” Printz v. United States, 521 U.S. 898, 919 (1997). And, of course, “enumeration presupposes something not enumerated.” Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824). But in Holland, the proponents of unlimited congressional power found a loophole: “By negotiating a treaty and obtaining the requisite consent of the Senate, the President . . . may endow Congress with a source of legislative authority independent of the powers enumerated in Article I.” Laurence H. Tribe, American Constitutional Law § 4-4, pp. 645-46 (3d ed. 2000). Though Holland’s change to the Constitution’s text appears minor (the power to carry into execution the power to make treaties becomes the power to carry into execution treaties), the change to its structure is seismic.

To see why vast expansion of congressional power is not just a remote possibility, consider two features of the modern practice of treaty making. In our Nation’s early history, and extending through the time when Holland was written, treaties were typically bilateral, and addressed only a small range of topics relating to the obligations of each state to the other, and to citizens of the other—military neutrality, for example, or military alliance, or guarantee of most-favored-nation trade treatment. See Curtis A. Bradley, The Treaty Power and American Federalism, 97 Mich. L. Rev. 390, 396 (1998). But beginning in the last half of the last century, many treaties were “detailed multilateral instruments negotiated and drafted at international conferences,” ibid., and they sought to regulate states’ treatment of their own citizens, or even “the activities of individuals and private entities,” Abram Chayes & Antonia Chandler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements 14 (1995). “[O]ften vague and open-ended,” such treaties “touch on almost every aspect of domestic civil,

Consider also that, at least according to some scholars, the Treaty Clause comes with no implied subject-matter limitations. On this view, “[t]he Tenth Amendment . . . does not limit the power to make treaties or other agreements,” Restatement (Third) of Foreign Relations Law of the United States § 302, Comment d, p. 154 (1986), and the treaty power can be used to regulate matters of strictly domestic concern.

If that is true, then the possibilities of what the Federal Government may accomplish, with the right treaty in hand, are endless and hardly farfetched. It could begin, as some scholars have suggested, with abrogation of this Court’s constitutional rulings. For example, the holding that a statute prohibiting the carrying of firearms near schools went beyond Congress’s enumerated powers, United States v. Lopez, 514 U.S. 549, 551 (1995), could be reversed by negotiating a treaty with Latvia providing that neither sovereign would permit the carrying of guns near schools. Similarly, Congress could reenact the invalidated part of the Violence Against Women Act of 1994 that provided a civil remedy for victims of gender-motivated violence, just so long as there were a treaty on point—and some authors think there already is . . . .

The Necessary and Proper Clause cannot bear such weight. . . . No law that flattens the principle of state sovereignty, whether or not “necessary,” can be said to be “proper.” . . .

The Government raises a functionalist objection: If the Constitution does not limit a self-executing treaty to the subject matter delineated in Article I, § 8, then it makes no sense to impose that limitation upon a statute implementing a non-self-executing treaty. The premise of the objection (that the power to make self-executing treaties is limitless) is, to say the least, arguable. But even if it is correct, refusing to extend that proposition to non-self-executing treaties makes a great deal of sense. Suppose, for example, that the self-aggrandizing Federal Government wishes to take over the law of intestacy. If the President and the Senate find in some foreign state a ready accomplice, they have two options. First, they can enter into a treaty with “stipulations” specific enough that they “require no legislation to make them operative,” Whitney v. Robertson, 124 U.S. 190, 194 (1888), which would mean in this example something like a comprehensive probate code. But for that to succeed, the President and a supermajority of the Senate would need to reach agreement on all the details—which, when once embodied in the treaty, could not be altered or superseded by ordinary legislation. The second option—far the better one—is for Congress to gain lasting and flexible control over the law of intestacy by means of a non-self-
executing treaty. “[Implementing] legislation is as much subject to modification and repeal by Congress as legislation upon any other subject.” Ibid. And to make such a treaty, the President and Senate would need to agree only that they desire power over the law of intestacy.

***

We have here a supposedly “narrow” opinion which, in order to be “narrow,” sets forth interpretive principles never before imagined that will bedevil our jurisprudence (and proliferate litigation) for years to come. The immediate product of these interpretive novelties is a statute that should be the envy of every lawmaker bent on trapping the unwary with vague and uncertain criminal prohibitions. All this to leave in place an ill-considered ipse dixit that enables the fundamental constitutional principle of limited federal powers to be set aside by the President and Senate’s exercise of the treaty power. We should not have shirked our duty and distorted the law to preserve that assertion; we should have welcomed and eagerly grasped the opportunity—nay, the obligation—to consider and repudiate it.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom JUSTICE ALITO joins as to Parts I, II, and III, concurring in the judgment.

I write separately to suggest that the Treaty Power is itself a limited federal power. Cf. United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (“[W]e always have rejected readings of . . . the scope of federal power that would permit Congress to exercise a police power”). The Constitution empowers the President, “by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” Art. II, § 2. The Constitution does not, however, comprehensively define the proper bounds of the Treaty Power, and this Court has not yet had occasion to do so. As a result, some have suggested that the Treaty Power is boundless—that it can reach any subject matter, even those that are of strictly domestic concern. See, e.g., Restatement (Third) of Foreign Relations Law of the United States, § 302, Comment c (1986). A number of recent treaties reflect that suggestion by regulating what appear to be purely domestic affairs. See, e.g., Curtis A. Bradley, The Treaty Power and American Federalism, 97 Mich. L. Rev. 390, 402-09 (1998) (citing examples).

Yet to interpret the Treaty Power as extending to every conceivable domestic subject matter—even matters without any nexus to foreign relations—would destroy the basic constitutional distinction between domestic and foreign powers. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (“[T]he federal power over external affairs [is] in origin and essential
character different from that over internal affairs . . .”). It would also lodge in the Federal Government the potential for “a ‘police power’ over all aspects of American life.” *Lopez*, *supra*, at 584 (Thomas, J., concurring). A treaty-based power of that magnitude—no less than a plenary power of legislation—would threaten “the liberties that derive from the diffusion of sovereign power.” *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). And a treaty-based police power would pose an even greater threat when exercised through a self-executing treaty because it would circumvent the role of the House of Representatives in the legislative process. *See* The Federalist No. 52, p. 355 (J. Cooke ed. 1961) (J. Madison) (noting that the House has a more “immediate dependence on, & an intimate sympathy with the people”).

I doubt the Treaty Power creates such a gaping loophole in our constitutional structure. Although the parties have not challenged the constitutionality of the particular treaty at issue here, in an appropriate case I believe the Court should address the scope of the Treaty Power as it was originally understood. Today, it is enough to highlight some of the structural and historical evidence suggesting that the Treaty Power can be used to arrange intercourse with other nations, but not to regulate purely domestic affairs . . .

[In parts I and II, Justice Thomas reviews various historical materials and argues that the treaty power was originally understood as applying only to matters of international intercourse. He acknowledges that the Founders decided not to enumerate limitations on the treaty power, but he contends that this was done in order to ensure that the federal government had the “ability to respond to unforeseeable varieties of intercourse with other nations,” not because they wanted to “permit the President and the Senate to exercise domestic authority commensurate with their substantial power over external affairs.”]

III

The original understanding that the Treaty Power was limited to international intercourse has been well represented in this Court’s precedents. Although we have not had occasion to define the limits of the power in much detail, we have described treaties as dealing in some manner with intercourse between nations. *See, e.g.*, *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840) (“The power to make treaties . . . was designed to include all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty”); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 242-43 (1872) (“[T]he framers of the Constitution intended that [the Treaty Power] should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States”). *Cf.*
Power Auth. of N.Y. v. Federal Power Comm’n, 247 F.2d 538, 542-43 (D.C. Cir. 1957) (Bazelon, J.) (“No court has ever said . . . that the treaty power can be exercised without limit to affect matters which are of purely domestic concern and do not pertain to our relations with other nations”), vacated as moot, 355 U.S. 64 (1957) (per curiam).

A common refrain in these cases is that the Treaty Power “extends to all proper subjects of negotiation with foreign governments.” Those cases identified certain paradigmatic instances of “intercourse” that were “proper negotiating subjects” fit for treaty. . . . Nothing in our cases, on the other hand, suggests that the Treaty Power conceals a police power over domestic affairs.

Whatever its other defects, Missouri v. Holland, 252 U.S. 416 (1920), is consistent with that view. There, the Court addressed the constitutionality of a treaty that regulated the capture of birds that migrated between Canada and the United States. Although the Court upheld a statute implementing that treaty based on an improperly broad view of the Necessary and Proper Clause, Holland did not conclude that the Treaty Power itself was unlimited. To the contrary, the holding in Holland is consistent with the understanding that treaties are limited to matters of international intercourse. The Court observed that the treaty at issue addressed migratory birds that were “only transitorily within the State and ha[d] no permanent habitat therein.” Id. at 435 (“[T]he treaty deals with creatures that [only] for the moment are within the state borders”). As such, the birds were naturally a matter of international intercourse because they were creatures in international transit.

At least until recently, the original understanding that the Treaty Power is limited was widely shared outside the Court as well. . . . The Second Restatement on the Foreign Relations Law of the United States, for example, opined that the Treaty Power is available only if the subject matter of the treaty “is of international concern.” § 117(1)(a) (1964-1965). The Second Restatement explained that a treaty “must relate to the external concerns of the nation as distinguished from matters of a purely internal nature.” Id., Comment b; see also Treaties and Executive Agreements: Hearings on S. J. Res. 1 before a Subcommittee of the Senate Committee on the Judiciary, 84th Cong., 1st Sess., 183 (1955) (Secretary of State Dulles) (Treaties cannot regulate matters “which do not essentially affect the actions of nations in relation to international affairs, but are purely internal”); Proceedings of the American Society of International Law 194-96 (1929) (C. Hughes) (“[The Treaty Power] is not a power intended to be exercised . . . with respect to matters that have no relation to international concerns”). But see Restatement (Third) of Foreign Relations Law of the United States § 302, Comment c (“Contrary to what was once suggested, the Constitution does not require that an international agreement deal only with ‘matters of
international concern’’"). At a minimum, the Second Restatement firmly reflects the understanding shared by the Framers that the Treaty Power has substantive limits. Only in the latter part of the past century have treaties challenged that prevailing conception by addressing “matters that in the past countries would have addressed wholly domestically” and “purport[ing] to regulate the relationship between nations and their own citizens,” Bradley at 396. But even the Solicitor General in this case would not go that far; he acknowledges that “there may well be a line to be drawn” regarding “whether the subject matter of [a] treaty is a proper subject for a treaty.” Tr. of Oral Arg. 43:10-15.

***

In an appropriate case, I would draw a line that respects the original understanding of the Treaty Power. I acknowledge that the distinction between matters of international intercourse and matters of purely domestic regulation may not be obvious in all cases. But this Court has long recognized that the Treaty Power is limited, and hypothetical difficulties in line-drawing are no reason to ignore a constitutional limit on federal power.

The parties in this case have not addressed the proper scope of the Treaty Power or the validity of the treaty here. The preservation of limits on the Treaty Power is nevertheless a matter of fundamental constitutional importance, and the Court ought to address the scope of the Treaty Power when that issue is presented. Given the increasing frequency with which treaties have begun to test the limits of the Treaty Power, that chance will come soon enough.

On page 298, insert the following at the end of Note 12:

See also Jean Galbraith, Congress’s Treaty-Implementing Power in Historical Practice, 56 WM. & MARY L. REV. 59 (2014) (arguing that historical practice supports Congress’s authority to use the Necessary and Proper Clause to implement treaties).

On page 298, replace Note 13 with the following Notes on Bond v. United States:

13. In Bond v. United States, the Court states that the “National Government” has only limited powers and that the “Federal Government,” unlike the states, does not have a police power. What implications, if any, do these statements have for the scope of the treaty power?
13a. The Court concludes that, properly construed, the Chemical Weapons Convention Implementation Act does not apply to Ms. Bond’s conduct. Was it appropriate for the Court to rely on the “natural meaning” of the term “chemical weapons” when both the Convention and the implementing legislation define that term? What was it about the statutory language that was ambiguous? What was the source of that ambiguity? Who has the better of the argument about the statute’s purported ambiguity—Chief Justice Roberts or Justice Scalia?

13b. The Court applies a clear statement requirement that it had developed in cases involving purely domestic statutes. Part of the justification for this requirement is that it forces Congress to specifically consider the federalism implications of intruding on state and local authority. Does this rationale apply to treaty implementing legislation? Does this decision suggest that other federalism-based presumptions, such as the presumption against preemption of state law, also apply to treaty implementing legislation? If so, does this mean that such presumptions also apply to foreign affairs legislation that does not implement a treaty? If so, can this conclusion be squared with the decisions discussed in Section A of Chapter 4, which suggest that federalism concerns have less salience in the interpretation of foreign relations statutes?

13c. The Court states that the clear statement rule applies to the interpretation of treaty implementing legislation but not to the interpretation of the treaty itself. Why not? Does this mean that the government can avoid the specificity required by the clear statement rule by making a treaty self-executing? Even if so, this may not be an option for treaty provisions that call for the criminalization of conduct: as mentioned in Note 10 on pages 279-80 of the casebook, it is generally assumed that such treaty provisions cannot be self-executing in the U.S. legal system.

13d. After this decision, what conduct does Section 229 cover? Does the Court’s “natural meaning” approach to construing the statute mean that the statute will now fail to provide sufficient notice of what it criminalizes, as Justice Scalia suggests? If so, does this mean that the Court erred in applying the clear statement requirement? Or does it mean that Congress should have drafted more precisely when it enacted the statute in the first place? In enacting the statute, why did Congress use language that was substantially similar to the language in the Convention? Is it likely that the Convention was drafted with the precision that is desirable in a criminal code? On the other hand, if Congress uses more precise language in the implementing legislation, might this cause the United States to be out of compliance with the requirements of the Convention?

13e. Consider the constitutional analysis in Justice Scalia’s concurrence. He would adopt the interpretation of the relationship between the treaty power and
the Necessary and Proper Clause that has been advocated by Professor Rosenkranz, as discussed in Note 12 on page 298 of the casebook. Does it make sense to conclude that, if the Senate and President decide to make a treaty non-self-executing and thereby involve the full Congress in the internal implementation of the treaty, the national government has less authority to regulate than if the Senate and President decide to make the treaty self-executing and thereby leave the House of Representatives out of the picture? How does Justice Scalia answer this question?

13f. Consider Justice Thomas’s concurrence. He would apply a subject matter limitation to the treaty power, something discussed in Note 1 on page 293 of the casebook. If treaties must concern “international intercourse,” as Thomas argues, what types of treaties could the Senate and President not constitutionally conclude? Do human rights treaties concern international intercourse?

13g. The Hostage Taking Act, 18 U.S.C. § 1203, implements the International Convention Against the Taking of Hostages, which the United States joined in 1984. The Act makes it a federal crime for anyone to kidnap and threaten to kill, injure, or continue detaining another person “in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained.” The Act applies to kidnappings in the United States as long as either the offender or the victim is an alien. By its terms, the Act appears to cover even local kidnappings that are designed to extract money from the victim’s family, as long as an alien is involved. In decisions prior to Bond, lower courts had concluded that the Act applied in such local kidnapping cases, and that even if such an application of the Act exceeded Congress’s normal legislative authority, it was valid under Missouri v. Holland. See United States v. Ferreira, 275 F.3d 1020 (11th Cir. 2001); United States v. Lue, 134 F.3d 79 (2d Cir. 1997). Will the clear statement requirement applied in Bond make a difference in future cases brought under the Hostage Taking Act?

13h. For commentary on Bond, see, for example, Curtis A. Bradley, Federalism, Treaty Implementation, and Political Process: Bond v. United States, 108 Am. J. Int’l L. 486 (2014); Heather K. Gerken, The Supreme Court, 2013 Term—Comment: Slipping the Bonds of Federalism, 128 Harv. L. Rev. 85 (2014); and Alison L. LaCroix, Redeeming Bond?: The Court’s Quiet Transformation of Federalism Doctrine, 128 Harv. L. Rev. F. 31 (2014). See also the symposium on Bond in Volume 99, Issue 4 of the Notre Dame Law Review, with contributions from Roger Alford, Duncan Hollis, Julian Ku & John Yoo, Saikrishna Prakash, Michael Ramsey, David Sloss, Paul Stephan, and Edward Swaine. The articles in the symposium that are of particular relevance to the constitutional scope of the treaty power include: Duncan B. Hollis, An Intersubjective Treaty Power, 90

On page 389, add the following Notes after Note 13 (and eliminate Note ** on page 265):

14. The executive branch sometimes concludes non-binding “political” agreements, also referred to as “soft law” agreements. In August 2014, for example, it was reported that President Obama was seeking to conclude a non-binding international agreement pursuant to which nations would cut fossil fuel emissions in order to address climate change. See Coral Davenport, Obama Pursuing Climate Accord in Lieu of Treaty, N.Y. Times, Aug. 26, 2014. Such agreements are typically concluded by the executive branch without the formal involvement of either the Senate or Congress. Are there any constitutional limits on the authority of the executive branch to conclude such agreements? Does the non-binding character of such agreements remove all constitutional concerns? For a defense of broad presidential authority to conclude such agreements, see Eric Posner, Treaty-ish, Slate, Aug. 28, 2014. For a more extensive consideration of the constitutional issues presented by political agreements, see Duncan B. Hollis & Joshua J. Newcomer, “Political” Commitments and the Constitution, 49 Va. J. Int’l L. 507 (2009). For discussion of how these agreements relate to U.S. administrative law, see Jean Galbraith & David Zaring, Soft Law as Foreign Relations Law, 99 Cornell L. Rev. 735 (2014), and David Zaring, Sovereignty Mismatch and the New Administrative Law, 91 Wash. U.L. Rev. 59 (2013).

15. As this Supplement was going to press, the United States, along with the other four permanent members of the U.N. Security Council plus Germany (“the P5+1”), was negotiating a possible agreement with Iran designed to diminish Iran’s nuclear weapons program in exchange for relief for Iran from various national and international sanctions. The negotiations, and Congress’s response to them, have raised a number of interesting foreign relations law issues.

Background. Dating back to the Iran Hostage crisis of 1979, Congress has enacted a series of laws that impose economic sanctions on Iran. See Dianne E. Rennack, Congressional Research Service, Iran: U.S. Economic Sanctions and the Authority to Lift Restrictions 1 (June 10, 2015). These sanctions are directed at different aspects of Iran’s behavior, including nuclear proliferation, human rights abuses, and state-sponsored terrorism. Almost all of these statutory sanctions empower the President to waive the sanctions, in his discretion, and for various
periods of time, if he determines certain statutory criteria are satisfied. The negotiations with Iran appear to be working toward an agreement whereby, if Iran adequately reduces its nuclear weapons production capabilities with verification assurances, the P5 will vote in the Security Council to lift sanctions against Iran and individual nations will agree to lift national sanctions as well. For the United States, this means that President Obama would direct the U.S. vote in the Security Council and exercise his statutory discretion to lift the U.S. sanctions against Iran related to nuclear proliferation.

The Cotton Letter. On March 9, 2015, in the midst of the negotiations, forty-seven Republican Senators signed a letter drafted by Senator Tom Cotton and addressed to “the Leaders of the Islamic Republic of Iran.” The stated premise of the letter was that Iran’s leaders “may not fully understand our constitutional system,” and in particular may not understand the nature of the “power to make binding international agreements.” The letter sought to bring to “the attention” of Iran’s leaders “two features” of the U.S. Constitution: “the power to make binding international agreements and the different character of federal offices.” The letter then explained each feature:

First, under our Constitution, while the president negotiates international agreements, Congress plays the significant role of ratifying them. In the case of a treaty, the Senate must ratify it by a two-thirds vote. A so-called congressional-executive agreement requires a majority vote in both the House and the Senate (which, because of procedural rules, effectively means a three-fifths vote in the Senate). Anything not approved by Congress is a mere executive agreement.

Second, the offices of our Constitution have different characteristics. For example, the president may serve only two 4-year terms, whereas senators may serve an unlimited number of 6-year terms. As applied today, for instance, President Obama will leave office in January 2017, while most of us will remain in office well beyond then—perhaps decades.

The letter closed by emphasizing the temporary nature of any agreement with President Obama. “The next president could revoke such an executive agreement with the stroke of a pen and future Congresses could modify the terms of the agreement at any time.”

The Cotton letter contained at least one technical error, and it rested in part on a misimpression. The error was that in “the case of a treaty, the Senate must ratify it by a two-thirds vote.” As we learned at the beginning of this chapter, the
Senate gives its advice and consent to treaties, but only the president can ratify them. This is an error that many people make, but it stood out in a letter that purported to “enrich [Iran’s leaders’] knowledge of our constitutional system.” The misimpression was that the “executive agreement” that President Obama was pursuing was intended to be a “binding international agreement.” As President Obama’s chief of staff made clear a few days later, and as the Administration continued to insist thereafter, the negotiation with Iran would result in a “non-binding agreement,” by which the Administration appeared to mean a political agreement that did not purport to bind under international law. See Letter from Denis McDonough, Assistant to the President, to Senator Bob Corker, Chairman, Senate Foreign Relations Committee (Mar. 14, 2015).

Many commentators questioned the propriety of the Senators’ letter, either on the ground either that it violated the Logan Act, 18 U.S.C. § 953 (discussed in note 16 on page 156 of the casebook), or that it ran afoul of “constitutional decorum” (because the president was in the middle of sensitive negotiations). Do you agree with either argument? (Some commentators also questioned the letter’s suggestion that a binding executive agreement could be revoked at will.)

The Significance of a Non-Binding Agreement. The executive branch increasingly relies on non-legal agreements like the proposed Iran deal to achieve its global objectives. See David Kaye, Stealth Multilateralism: U.S. Foreign Policy Without Treaties—or the Senate, Foreign Affairs, Sept.–Oct. 2013, at 122 (“[N]onbinding arrangements may now be the executive branch’s preferred way of doing business.”). These agreements are much easier to negotiate and implement than a binding agreement, in part because they do not require domestic approval.

Negotiating a non-binding agreement with Iran allows President Obama to side-step hard questions about whether he could have reached a binding agreement with Iran on his own authority, or whether such an agreement would have required ex post congressional or senatorial approval. And yet the president can still lift sanctions pursuant to the non-binding deal, without seeking’s Congress’s approval, because Congress has conferred on him such waiver authority under domestic law. One limitation on this approach is that the bulk of the pertinent sanctions waivers are temporary and thus must be renewed after a period—typically, one year. Thus whatever the Iran deal might say, president Obama could only ensure that the United States would lift its sanctions through his term and a bit into the next presidency. The next president could abrogate the agreement, and refuse to waive sanctions against Iran after Obama’s waivers expire, without violating domestic or international law.

Transforming A Non-Binding Agreement Into a Binding One? Some commentators speculated, however, that the President could transform a non-
binding agreement with Iran into a legally binding one by having the U.N. Security Council—where the president through his representative votes for the United States—bless the deal. The parties to the Iran negotiation do appear to contemplate some form of Security Council approval of the deal. Assume that the Security Council, exercising its Chapter VII authorities, both agreed to lift its own sanctions, and also determined that the signatory parties to the deal with Iran (P5+1) had an international obligation to lift domestic sanctions in accordance with the deal’s terms. Could such action by the Security Council effectively transform the non-binding agreement into binding obligations? Could the president vote for such a resolution in the Security Council, and effectively impose an international law obligation on the United States to reduce Iran’s sanctions, without prior congressional approval? Would a future president then be bound by international law to exercise his or her discretion to lift sanctions under domestic law? These speculations may be academic, since the Obama Administration has indicated that it does not intend to use the Security Council vote in this manner. See Hayes Brown, U.S. “Has No Intention” Of Using United Nations To Cement Iran Deal, Buzzfeed News (March 12, 2015), at http://www.buzzfeed.com/hayesbrown/us-declines-to-comment-on-potential-united-nations-role-in-i#.jj3Ppdx70p (spokeswoman for National Security Council stated that United States would not be “converting U.S. political commitments under a deal with Iran into legally binding obligations through a UN Security Council resolution”). But we will not know for sure until we see the text of the agreement and of the Security Council resolution (assuming they materialize).

Iran Nuclear Agreement Review Act of 2015. On May 22, 2015, President Obama signed into law the Iran Nuclear Agreement Review Act of 2015, Pub. L. 114-17. The statute requires the President to transmit to Congress any agreement with Iran relating to its nuclear program, and it restricts the President from waiving sanctions against Iran during a specified period (30-85 days, depending on when the agreement is reached) during which time Congress could approve or reject the agreement, or take no action at all. The law also provides that if the President does eventually waive sanctions against Iran, he must report to Congress periodically on Iran’s compliance with the nuclear agreement, and it provides for an expedited schedule for Congress to re-impose sanctions if Iran refuses to comply with the agreement.

Where does Congress get the authority to delay implementation of a non-binding agreement negotiated by the president? Does it flow from its authority to impose the underlying sanctions? Note that President Obama had originally opposed the legislation, and threatened to veto it, on these grounds:

However, the legislation you have introduced in the Senate goes well beyond ensuring that Congress has a role to play in any deal with
Iran. Instead, the legislation would potentially prevent any deal from succeeding by suggesting that Congress must vote to “approve” any deal, and by removing existing sanctions waiver authorities that have already been granted to the President. We believe that the legislation would likely have a profoundly negative impact on the ongoing negotiations—emboldening Iranian hard-liners, inviting a counter-productive response from the Iranian majiles; differentiating the U.S. position from our allies in the negotiations; and once again calling into question our ability to negotiate this deal. This would therefore complicate the possibility of achieving a peaceful resolution to the Iranian nuclear issue if legislative action is taken before a deal is completed. Moreover, if congressional action is perceived as preventing us from reaching a deal, it will create divisions within the international community, putting at risk the very international cooperation that has been essential to our ability to pressure Iran. Put simply, it would potentially make it impossible to secure international cooperation for additional sanctions, while putting at risk the existing multilateral sanctions regime.

In addition to its impact on the negotiations, this legislation would also set a potentially damaging precedent for constraining future Presidents of either party from pursuing the conduct of essential diplomatic negotiations, making it much harder for future Presidents to negotiate similar political commitments. These factors have led the President to determine that he would veto this legislation, were it to pass the Congress.

See McDonough Letter, supra. McDonough does not quite claim here that the legislation would be unconstitutional. But under the reasoning of the Supreme Court’s recent decision in Zivotofsky II (excerpted above in the materials for Chapter 3), might the Executive Branch have plausibly argued that the proposed legislation unconstitutionally interfered in the president’s negotiations with Iran?

Chapter 6: Customary International Law

On page 426, add the following at the end of Note 15, before Section C:

For an article contesting the Supreme Court’s premise in Sosa that, when the ATS was enacted, Congress would have assumed that the common law would have supplied a cause of action for ATS cases, see Anthony J. Bellia Jr. & Bradford R. Clark, The Original Source of the Cause of Action in Federal Courts: The
Example of the Alien Tort Statute, 101 Va. L. Rev. 609 (2015). Bellia and Clark argue that, when the ATS was enacted, “there was no single body of ‘common law’ that applied throughout the United States” and that “Congress made no attempt to follow the states’ lead by adopting its own version of the common law as a whole for the nation, in part because any such attempt would have exceeded enumerated federal powers as then understood.” Instead, the authors maintain that, in early procedural statutes, Congress “directed federal courts to apply the same causes of action that local state courts applied in cases at law, and to apply traditional causes of action in equity and admiralty cases.” It was therefore inappropriate, they contend, for the Court in Sosa to rely on the “ambient law of the era” as support for allowing the development of modern federal common law causes of action in ATS cases. They conclude that “long-standing historical practice suggests that state law may continue to define the causes of action available when federal courts exercise jurisdiction under the ATS.”

On page 447, add the following at the end of Note 16:

In Mastafa v. Chevron Corp., 770 F.3d 170 (2d Cir. 2014), the court held that, “in determining whether a claim under the ATS sufficiently ‘touches and concerns’ the United States with sufficient force to displace the presumption against extraterritorial application, courts must consider the following principles:

a. . . . the ‘focus’ of the ATS—and, thus, the focus of the jurisdictional inquiry—is the conduct alleged to violate the law of nations (or alleged to aid and abet the violation of the law of nations), and where that conduct occurred.

b. To establish our jurisdiction under the ATS, the complaint must plead: (1) conduct of the defendant that ‘touch[ed] and concern[ed]’ the United States with sufficient force to displace the presumption against extraterritoriality, and (2) that the same conduct, upon preliminary examination, states a claim for a violation of the law of nations or aiding and abetting another’s violation of the law of nations.

c. In identifying the ‘relevant conduct’ for jurisdictional purposes, . . . neither the U.S. citizenship of defendants, nor their mere presence in the United States, is relevant to a court’s determination of its jurisdiction. . . .”

Is this approach consistent with the analysis in Kiobel?
On page 448, add the following at the end of Note 18:

For an effort to situate ATS litigation “within the traditional federal-courts framework of implied rights of action and federal common law,” and an argument that this framework supports the Supreme Court’s disallowance in *Kiobel* of “universal jurisdiction” under the ATS (that is, jurisdiction in cases in which the parties are not U.S. nationals and the relevant conduct took place outside the United States), see Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public Law Litigation After Kiobel*, 64 Duke L.J. 1023 (2015). (Universal jurisdiction is discussed at pages 534-36 of the casebook.) For a consideration of legal strategies for pursuing human rights accountability after *Kiobel*, see Roxanna Altholz, *Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post-Kiobel*, 102 Calif. L. Rev. 1495 (2014).

On page 462, add the following at the end of Note 9:

The Supreme Court has agreed to review a case that involves the “based upon” issue, and more generally the mixing of tort liability and commercial activity. See Sachs v. Republic of Austria, 737 F.3d 584 (9th Cir. 2013), cert. granted, OBB Personenverkehr AG v. Sachs, 135 S. Ct. 1172 (2015). In that case, a California resident purchased a Eurail pass over the Internet from a travel agent in Massachusetts that was authorized by the Eurail group to sell passes. When boarding an Austrian state-owned train in Austria, which is part of the network of trains recognizing the Eurail pass, the plaintiff was seriously injured. She sued the railway, alleging negligence, strict liability, and breach of implied warranty. In a divided en banc decision, the Ninth Circuit held that the plaintiff’s claims were “based upon a commercial activity carried on in the United States by the foreign state” within the meaning of the first clause of the FSIA’s commercial activity exception. The court reasoned that the actions of the travel agent could be attributed to the railway, and that the sale of the ticket in the United States was an essential element of the plaintiff’s strict liability claim. The case will be argued before the Supreme Court in the Fall of 2015.
On page 465, add the following at the end of Note 16:

In May 2015, the executive branch removed Cuba from the list of state sponsors of terrorism, as part of an effort by the Obama Administration to begin normalizing relations between the United States and Cuba. This action left only Iran, Sudan, and Syria on the list.

On page 466, add the following Notes after Note 17:

17a. The Supreme Court construed the FSIA’s provisions for sovereign immunity from execution on a judgment (as opposed to immunity from the exercise of jurisdiction) in Republic of Argentina v. NML Capital Ltd., 134 S. Ct. 2250 (2014). The case grew out of a default on Argentine bonds that Argentina later renegotiated, on less favorable terms, with so-called “exchange bondholders.” Respondent NML Capital, Ltd. refused the renegotiation and brought eleven lawsuits on debts owed under the original bonds. Argentina had waived its immunity from jurisdiction, and NML prevailed on the merits in each case. In an attempt to enforce judgments worth $2.5 billion, NML then issued subpoenas to two non-party banks, seeking information about Argentina’s offshore financial transactions. Argentina objected that the discovery order violated the FSIA, but the Supreme Court disagreed.

The Court assumed that the Federal Rules of Civil Procedure permit discovery of third-party information related to a judgment debtor’s extraterritorial assets and then considered whether the FSIA’s provisions relating to immunity from execution, 28 U.S.C. §§ 1609-11, barred such discovery. Section 1609 states that “the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution,” subject to exceptions in Section 1610, which include “property in the United States of a foreign state” that is “used for a commercial activity in the United States,” see § 1610(a), and that is also subject to another enumerated exception to immunity (such as waiver), see § 1610(a)(1)-(7). The FSIA also confers broader sovereign immunity from execution on certain designated property (such as property of a foreign central bank and foreign military property), see § 1611. Because none of these provisions purports to provide immunity from discovery in aid of judgment execution, the Court concluded that the FSIA permits the discovery. The Court rejected the argument that Sections 1609-11 simply narrowed an otherwise still-applicable pre-FSIA rule of absolute immunity from execution that included a disallowance of discovery of extraterritorial assets. It doubted the existence of any such pre-FSIA immunity, and ruled that the language of Section 1609 controlled in any event.
Perhaps more significant than the Court’s holding were its more general statements about the interpretive principles that govern the FSIA. It noted that the FSIA replaced the “bedlam” of “executive-driven, factor-intensive” immunity determinations, which often turned on “diplomatic” and “political” factors, with the FSIA, which established a “comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.” As a result, the Court concluded, “any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act’s text,” or “it must fall.” (Emphasis added.) This sharp focus on the FSIA’s text led the Court to reject claims by Argentina and the United States, as amicus curiae, that various foreign relations concerns should inform the interpretation of the FSIA and limit discovery:

Discovery orders as sweeping as this one, the Government warns, will cause “a substantial invasion of [foreign states’] sovereignty,” Brief for United States as Amicus Curiae 18, and will “[u]ndermin[e] international comity,” id. at 19. Worse, such orders might provoke “reciprocal adverse treatment of the United States in foreign courts,” id. at 20, and will “threaten harm to the United States’ foreign relations more generally,” id. at 21. These apprehensions are better directed to that branch of government with authority to amend the Act—which, as it happens, is the same branch that forced our retirement from the immunity-by-factor-balancing business nearly 40 years ago.

On the same day that it decided this case, the Supreme Court denied certiorari in a related case. In that case, the Second Circuit affirmed injunctions by the district court that had interpreted the equal treatment (“pari passu”) clause in a different set of bonds to require Argentina to pay NML if it made payments to exchange bondholders who accepted the earlier renegotiation. See NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246 (2d Cir. 2012). Argentina argued that the injunctions violated the FSIA by ordering it to pay plaintiffs with immune property located outside the United States. The Second Circuit disagreed. The court noted that Argentina could comply with the injunction without the court exercising any dominion over sovereign property, including by paying both the exchange bondholders and the defaulted bondholders, or at least a proportionate amount to both. Because the injunctions “do not transfer any dominion or control over sovereign property to the court,” the Second Circuit concluded, they “do not violate § 1609.”

17b. It is generally assumed that, by shifting immunity determinations away from the executive branch to the courts, the FSIA made these determinations less political. For a challenge to this assumption, see Adam S. Chilton & Christopher A. Whytock, Foreign Sovereign Immunity and Comparative
Institutional Competence, 163 U. Pa. L. Rev. 411 (2015). Based on a statistical evaluation of foreign sovereign immunity determinations made before and after the enactment of the FSIA, the authors find “little evidence that political factors were systematically related to the State Department’s foreign sovereign immunity decisions,” and “significant evidence that political factors are related to the judiciary’s immunity decisions.”

Chapter 8: War Powers

On page 607, add the following at the end of the carryover paragraph before Section B:

For a historically-based argument that the Constitution “grants Congress broad power to safeguard the Constitution and its government from invasions and rebellions,” including through delegation of extensive authority to the President, see Saikrishna Bangalore Prakash, The Sweeping Domestic War Powers of Congress, 113 Mich. L. Rev. 1337 (2015).

On page 628, add the following Note after Note 16:

17. The Islamic State of Iraq and the Levant (“ISIL,” also known as The Islamic State) emerged from the remnants of Al Qaeda in Iraq (“AQI”), an Al Qaeda affiliate that the United States fought in Iraq in the 2000s as part of the Sunni insurgency there. In 2013, AQI changed its name to ISIL, and in 2014, after a power struggle with Al Qaeda and some of its associates, ISIL cut all ties with Al Qaeda. ISIL fought in the Syrian civil war, occupied significant territory in Iraq and Syria in the spring and summer of 2014, and declared a “caliphate” (a form of Islamic government) in June 2014. As part of its operations, it committed a variety of atrocities.

In August 2014, U.S. military forces initiated airstrikes in Iraq against ISIL. In his War Powers Resolution notification to Congress, President Obama explained that the military operations were “limited in their scope and duration” and were justified on the basis of self-defense (“to protect American personnel in Iraq by stopping the current advance on Erbil”) and humanitarian grounds (“to help forces in Iraq as they fight to break the siege of Mount Sinjar and protect the civilians trapped there”). The President stated that he took these actions “pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.” For the next month, the President authorized additional airstrikes in Iraq, for both self-defense and humanitarian purposes, and
continued to justify those strikes based solely on his authority under Article II of the Constitution.

On September 10, 2014, President Obama addressed the nation and explained that ISIL posed a threat to Iraq, Syria, the Middle East, U.S. persons in those places, and potentially the United States homeland. He announced a campaign to “degrade, and ultimately destroy, ISIL through a comprehensive and sustained counterterrorism strategy” that included a “systematic campaign of airstrikes against these terrorists.” U.S. airstrikes against ISIL subsequently expanded in number and extended geographically to Syria. In a War Powers Resolution letter to Congress on September 23, 2014, President Obama stated that he was taking the measures “pursuant to my constitutional and statutory authority as Commander in Chief” (emphasis added). He explained that his statutory authority included the 2001 AUMF (which authorized the use of force against the “nations, organizations, or persons” responsible for the 9/11 attacks) and the 2002 AUMF (which authorized the President to use force to “defend the national security of the United States against the continuing threat posed by Iraq”). The Obama Administration never published an official legal opinion explaining why these statutes applied to ISIL in Iraq and Syria, but a “senior administration official” did provide this explanation anonymously about the 2001 AUMF:

The 2001 AUMF authorizes the use of “all necessary and appropriate force against those nations, organizations, or persons” responsible for 9/11 and those who “harbored such organizations or persons.” The Administration has interpreted the 2001 AUMF to authorize the use of force against AQ, the Taliban, and associated forces. Based on ISIL’s longstanding relationship with al-Qa’ida (AQ) and Usama bin Laden; its long history of conducting, and continued desire to conduct, attacks against U.S. persons and interests, the extensive history of U.S. combat operations against ISIL dating back to the time the group first affiliated with AQ in 2004; and ISIL’s position—supported by some individual members and factions of AQ-aligned groups—that it is the true inheritor of Usama bin Laden’s legacy, the President may rely on the 2001 AUMF as statutory authority for the use of force against ISIL, notwithstanding the recent public split between AQ’s senior leadership and ISIL.

As of the publication of this Supplement in July 2015, the Obama Administration continues to use significant force from the air in Iraq and Syria. President Obama has also sent several thousand U.S. soldiers to Baghdad to protect U.S. property and persons there. In June 2015 the President announced
that he was sending up to 450 additional American troops to Iraq to train and assist Iraqi forces battling ISIL.

On November 5, 2014, President Obama stated in a press conference that he was “going to begin engaging Congress over a new authorization to use military force against ISIL” because the world “needs to know we are united behind this effort and the men and women of our military deserve our clear and unified support.” He also stated that he wanted to “right-size and update” the 2001 AUMF to “suit the current fight, rather than previous fights.”

On February 11, 2015, the President formally sought a new AUMF for the use of force against ISIL and submitted the following draft to Congress:

JOINT RESOLUTION To authorize the limited use of the United States Armed Forces against the Islamic State of Iraq and the Levant. …

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the “Authorization for Use of Military Force against the Islamic State of Iraq and the Levant.”

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) AUTHORIZATION.—The President is authorized, subject to the limitations in subsection (c), to use the Armed Forces of the United States as the President determines to be necessary and appropriate against ISIL or associated persons or forces as defined in section 5.

(b) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8(a)(1) of the War Powers Resolution (50 U.S.C. 1547(a)(1)), Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)).
(2) APPLICABILITY OF OTHER REQUIREMENTS.—Nothing in this resolution supersedes any requirement of the War Powers Resolution (50 U.S.C. 1541 et seq.).

(c) LIMITATIONS.—

The authority granted in subsection (a) does not authorize the use of the United States Armed Forces in enduring offensive ground combat operations.

SEC. 3. DURATION OF THIS AUTHORIZATION.

This authorization for the use of military force shall terminate three years after the date of the enactment of this joint resolution, unless reauthorized.

SEC. 4. REPORTS.

The President shall report to Congress at least once every six months on specific actions taken pursuant to this authorization.

SEC. 5. ASSOCIATED PERSONS OR FORCES DEFINED.

In this joint resolution, the term “associated persons or forces” means individuals and organizations fighting for, on behalf of, or alongside ISIL or any closely-related successor entity in hostilities against the United States or its coalition partners.

SEC. 6. REPEAL OF AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST IRAQ.


As of July 2015, the President’s draft faced no immediate prospect of enactment.

In addition to the President’s proposal, several proposals for a new AUMF for ISIL emerged in Congress in 2014 and 2015. These proposals would all authorize force against ISIL but differ along several dimensions, including whether they (1) authorize force against groups associated with ISIL, (2) contain a limitation on the use of ground troops, (3) contain a geographical limitation on the use of force to Iraq and Syria, (4) include sunset clauses, or (5) modify or repeal

Three such proposals are worth particular note. First, on December 3, 2014, Senator Rand Paul proposed a declaration of war against ISIL. The operative section of Paul’s proposal provides:

(a) DECLARATION. The state of war between the United States and the organization referring to itself as the Islamic State, also known as the Islamic State of Iraq and the Levant (ISIL) and the Islamic State of Iraq and Syria (ISIS), which has been thrust upon the United States, is hereby formally declared pursuant to Article I, section 8, clause 11, of the United States Constitution.

(b) AUTHORIZATION. The President is hereby authorized and directed to use the Armed Forces of the United States to protect the people and facilities of the United States in Iraq and Syria against the threats posed thereto by the organization referring to itself as the Islamic State, also known as the Islamic State of Iraq and the Levant (ISIL) and the Islamic State of Iraq and Syria (ISIS).

Second, on December 11, 2014, the Senate Foreign Relations Committee approved, on a vote of 10-8, a proposed AUMF. This proposal would authorize the use of the armed forces “as the President determines to be necessary and appropriate” against the Islamic State “or associated persons or forces”; it would generally disallow the use of forces for ground combat operations except for the protection and rescue of U.S. service personnel and citizens and to support other operations not involving ground combat; and it would last only for three years unless renewed by Congress. It would also repeal the 2002 AUMF relating to Iraq and have the 2001 AUMF terminate in three years unless renewed by Congress. The Foreign Relations Committee proposal never made it to the floor of Congress.

Third, and most recently, on June 8, 2015, Senators Kaine and Flake proposed a bipartisan draft AUMF that would authorize the President “to use the Armed Forces of the United States as the President determines necessary and appropriate against ISIL or associated persons or forces as defined in section 6.” Section 6 defines “associated persons or forces” to mean “individuals and organizations fighting for, on behalf of, or alongside ISIL or any closely-related successor entity in hostilities against the United States or its coalition partners; and any individual or organization that presents a direct threat to members of the United States Armed Forces, coalition partner forces, or forces trained by the coalition, in their fight against ISIL.” In Section 3(c), it avoids addressing the
issue of the use of ground troops directly and instead states that the “purpose of this authorization is to protect the lives of United States citizens and to provide military support to regional partners in their battle to defeat ISIL,” and that the “use of significant United States ground troops in combat against ISIL, except to protect the lives of United States citizens from imminent threat, is not consistent with such purpose.” It also states in Section 8 that “[t]his authorization shall constitute the sole statutory authority for United States military action against the Islamic State of Iraq and the Levant and associated persons or forces, and supersedes any prior authorization for the use of military force involving action against ISIL.”

Has the President’s use of force against ISIL since August 2014 been consistent with U.S. domestic law? Did the President have authority under Article II of the Constitution to authorize the air strikes in August and early September for purely humanitarian purposes? How does the humanitarian situation in Iraq differ, legally, from the situations in Kosovo (1999) and Libya (2011)? Is the President’s claim that the 2001 AUMF authorizes force against ISIL persuasive? How can the AUMF extend to ISIL if that organization is no longer part of or associated with Al Qaeda? Is the reliance on the 2002 AUMF for Iraq more or less persuasive?

Why did the President propose an AUMF for ISIL if he thinks he already has full authority to use force against it under some combination of the 2001 and 2002 AUMFs and Article II? If the President’s proposal passed, would it enlarge or contract his overall military powers? Does the limit on ground forces in Section 2(c) of the President’s draft leave the President free to order ground troops, either under Article II or under his prior interpretation of the 2001 AUMF, which contains no ground troops limitation, given that the President’s draft leaves in place the 2001 AUMF? Note how the Kaine/Flake proposal differs on these points. Note also how much narrower Senator Paul’s authorization for the use of force is compared to the other proposals. It is also unique in proposing a declaration of war. Does this proposal make any sense in 2015 in the context of a war against a transnational non-state actor terrorist group?

On page 649, add the following at the end of Note 19:

For a discussion of how psychological research concerning decisionmaking biases might have implications for war powers debates, including debates over possible reforms of the War Powers Resolution, see Ganesh Sitaraman & David Zionts, Behavioral War Powers, 90 N.Y.U. L. Rev. 516 (2015).
Chapter 9: War on Terrorism

On page 719, add the following Note after Note 8:

8a. Section 1035 of the 2014 National Defense Authorization Act authorizes the Secretary of Defense to “transfer or release any individual detained at Guantanamo” if he makes certain determinations. It also provides that “[t]he Secretary of Defense shall notify the appropriate committees of Congress of a determination [to release or transfer a detainee] not later than 30 days before the transfer or release of the individual,” and it specifies the information that “[e]ach notification shall include, at minimum.” When signing this Act into law in December 2013, President Obama issued a signing statement that expressed the view that Section 1035, while an improvement over restrictions in earlier legislation, “in certain circumstances, would violate constitutional separation of powers principles.” Obama further observed that “[t]he executive branch must have the flexibility, among other things, to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers.”

On May 31, 2014, the United States released to the government of Qatar five senior Taliban detainees held at the Guantanamo Bay detention center in exchange for the lone American prisoner of war from the Afghan conflict, Sergeant Bowe Bergdahl. The Obama Administration did not provide the thirty-day notice to Congress specified in Section 1035. At the time, top officials in the Administration hinted that the Administration had determined that the notice requirement in the context of the swap for Bergdahl was unconstitutional. See News Transcript, U.S. Department of Defense, Media Availability with Secretary Hagel en route to Afghanistan, June 1, 2014, at http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5443 (Secretary of Defense Hagel maintains that “we believe that the president of the United States is commander in chief, has the power and authority to make the decision that he did under Article II of the Constitution”); State of the Union with Candy Crowley, June 1, 2014, at http://transcripts.cnn.com/TRANSCRIPTS/1406/01/sotu.01.html (National Security Advisor Susan Rice states that “given the acute urgency of the health condition of Sergeant Bergdahl, and given the president’s constitutional responsibilities, it was determined that it was necessary and appropriate not to adhere to the 30-day notification requirement, because it would have potentially meant that the opportunity to get Sergeant Bergdahl would have been lost”).

The fullest explanation of the Administration’s legal reasoning came in an unsigned, undated analysis from the Defense Department to Congress’s General Accounting Office (GAO):
The transfer was necessary to secure the release of a captive U.S. soldier, and the Administration had determined that providing notice as specified in the statute could jeopardize negotiations to secure the soldier’s release and endanger the soldier’s life. In those circumstances, providing notice would have interfered with the Executive's performance of two related functions that the Constitution assigns to the President: protecting the lives of Americans abroad and protecting U.S. service members. Such interference would “significantly alter the balance between Congress and the President,” and could even raise constitutional concerns; and courts have required a “clear statement” from Congress before they will interpret a statute to have such an effect. Armstrong v. Bush, 924 F.2d 282, 289 D.C. Cir. (1991). Congress may not have spoken with sufficient clarity in section 1035(d) because the notice requirement does not in its terms apply to a time-sensitive prisoner exchange designed to save the life of a U.S. soldier. Cf. Bond v. United States, 134 S. Ct. 2077, 2090-93 (2014). . . .

If section 1035(d) were construed as applicable to the transfer, the statute would be unconstitutional as applied because requiring 30 days’ notice of the transfer would have violated the constitutionally-mandated separation of powers. Compliance with a 30 days’ notice requirement in these circumstances would have “prevent[ed] the Executive Branch from accomplishing its constitutionally assigned functions,” Morrison v. Olson, 487 U.S. 654, 695 (1988), without being “justified by an overriding need” to promote legitimate objectives of Congress, Nixon v. Administrator of General Servs., 433 U.S. 425, 443 (1977). As just discussed, the Administration had determined that providing notice as specified in the statute would undermine the Executive’s efforts to protect the life of a U.S. soldier. Congress’s desire to have 30 days to weigh in on the determination that the Secretary had already made, in accordance with criteria specified by Congress, that the transfer did not pose the risks that Congress was seeking to avoid, was not a sufficiently weighty interest to justify this frustration of the Executive's ability to carry out these constitutionally assigned functions. Thus, even though, as a general matter, Congress had authority under its constitutional powers related to war and the military to enact section 1035(d), that provision would have been unconstitutional to the extent it applied to the unique circumstances of this transfer.

The GAO responded to these arguments by concluding that the Defense Department had violated Section 1035, but it failed to engage the Administration’s legal arguments fully because it said it lacked authority to “offer any opinion on the constitutionality of section 1035.” See Memorandum from Susan A. Poling, General Counsel, Government Accountability Office, to the Honorable Mitch McConnell et al., Department of Defense—Compliance with Statutory Notification Requirement (Aug. 21, 2014), at http://www.gao.gov/assets/670/665390.pdf.

Are you convinced by the Defense Department’s arguments? The first argument is that because the notice requirement would raise constitutional concerns, the statute should be read not to require notice in the emergency context presented by the Bergdahl transfer. Typically, the canon of constitutional avoidance requires the statute under interpretation to be ambiguous. But note the citation to Bond, which applied an avoidance canon in the federalism context to statutory language that was arguably clear on its face. Is this form of argument legitimate when the statute seems so clearly to require notice?

The second argument is that the notice is “unconstitutional as applied.” Presumably the “constitutionally assigned functions” that the notice requirement frustrated are “protecting the lives of Americans abroad and protecting U.S. service members.” Do these presidential functions flow from his designation as Commander in Chief? Why was Congress’s desire to consider the appropriateness of the transfer within the thirty-day period “not a sufficiently weighty interest to justify this frustration of the Executive's ability to carry out these constitutionally assigned functions”? Can the president disregard any statutory restrictions that would jeopardize negotiations to secure a soldier’s release? Could he, for example, disregard the substantive determinations that Congress requires the President to make before releasing or transferring a detainee?

Relatedly, might the Defense Department use similar logic to ignore congressional restrictions on transferring detainees to the United States as part of a larger effort to close the Guantanamo detention facility? Section 1033 in the 2015 National Defense Authorization Act continued the restrictions in Section 1034 of the 2014 National Defense Authorization Act (see Note 8 on page 719 of the casebook), which prevents the Department of Defense from using appropriated funds “to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions of Khalid Sheikh Mohammed or any other detainee who . . . is or was held on or after January 20, 2009, at United States Naval Station, Guantanamo Bay, Cuba, by the Department of Defense.” In his signing statement to the 2015 law, President Obama said this about the congressional transfer restrictions for Guantanamo:
I have consistently opposed these restrictions [on transfers abroad and to the United States] and will continue to work with the Congress to remove them. More than 80 percent of detainees at one time held at the detention facility have now been transferred. The executive branch must have the flexibility, with regard to those detainees who remain, to determine when and where to prosecute them, based on the facts and circumstances of each case and our national security interests, and when and where to transfer them consistent with our national security and our humane treatment policy. Under certain circumstances, the provisions concerning detainee transfers in both bills would violate constitutional separation of powers principles.

Statement By The President on H.R. 3979 (Dec. 19, 2014). In addition, President Obama thinks that not closing Guantanamo “endangers national security,” see Charlie Savage, Decaying Guantánamo Defies Closing Plans, N.Y. Times, September 1, 2014, and some of the Islamic State beheadings of American citizens have been tied in part to Guantánamo. Could the Administration extend the Bergdahl swap rationale to an argument that the President’s Article II duty to protect the lives of U.S. soldiers and citizens allows him to ignore the transfer restrictions as part of closing Guantánamo? What different legal considerations would be in play as compared with the Bergdahl swap?

On page 725, add the following at the end of Note 11:

During 2014 and 2015, the Obama Administration continued to seek ways to reduce the number of detainees at Guantánamo. In December 2014, it transferred six detainees to Uruguay. See Charlie Savage, Uruguay Accepts 6 Detainees Held at Guantánamo, N.Y. Times, Dec. 7, 2014. And, in June 2015, it transferred six detainees to Oman, reducing the total number of detainees at Guantánamo to 116. See Charlie Savage, 6 Guantánamo Detainees from Yemen are Transferred to Oman, N.Y. Times, June 13, 2015.

On page 726, add the following after Note 12:

    The wind-down of the U.S. presence in Afghanistan has raised the question whether certain Guantánamo detainees must be released because the conflict there is ending. On December 28, 2014, President Obama stated that “our combat mission in Afghanistan is ending, and the longest war in American history is coming to a responsible conclusion.” And on January 28, 2015, he said that “[a]fter more than 13 years, our combat mission in Afghanistan is over, and America’s longest war has come to a responsible and honorable end.” Based on
these and related statements, a Guantanamo detainee named Mukhtar Yahia Naji al Warafi has argued in a habeas action that, because he is detained on the basis of his membership in the Taliban, and because the United States and the Taliban are no longer in armed conflict, the government’s authority to detain him has expired. In a subsequent speech on April 10, 2015, Defense Department General Counsel Stephen Preston emphasized that, despite President Obama’s statements, hostilities in Afghanistan were not ending anytime soon. “Because the Taliban continues to threaten U.S. and coalition forces in Afghanistan, and because al-Qa’ida and associated forces continue to target U.S. persons and interests actively,” Preston said, “the United States will use military force against them as necessary. Active hostilities will continue in Afghanistan (and elsewhere) at least through 2015 and perhaps beyond.” Then two weeks later, in a brief responding to Warafi’s argument, the government maintained (based on significant documentary evidence) that hostilities in Afghanistan continued, and that President Obama was stating only that the combat mission in Afghanistan, and not hostilities, had ended. The government further argued that “the determination of whether hostilities have ended is a matter of ‘political judgment for which judges have neither technical competence nor official responsibility’” (quoting Ludecke v. Williams, 335 U.S. 160, 170 (1948)). As this Supplement was being published, the District Court had not yet ruled on the issue.

On page 740, add the following Notes after Note 12.

12a. The D.C. Circuit partially overruled Hamdan II (discussed in Note 11 on page 739 of the casebook) in United States v. Al Bahlul, 767 F.3d 1 (D.C. Cir. 2014). Bahlul was a personal assistant to Osama bin Laden who produced propaganda videos for Al Qaeda and helped the organization prepare for the attacks of September 11, 2001. A military commission convicted him of conspiracy to commit war crimes, providing material support for terrorism, and solicitation of others to commit war crimes, and it sentenced him to life imprisonment. The United States Court of Military Commission Review affirmed his conviction and sentence. While Bahlul’s appeal to the D.C. Circuit was pending, that court issued Hamdan II, which held that the 2006 Military Commissions Act “does not authorize retroactive prosecution for conduct committed before enactment of that Act unless the conduct was already prohibited under existing U.S. law as a war crime triable by military commission.” The U.S. government subsequently conceded that Hamdan II’s reasoning required that all three of Bahlul’s convictions be vacated, but after a panel of the D.C. Circuit did so, the government sought and received rehearing en banc to question the validity of Hamdan II.
Judge Henderson wrote the majority opinion for the court that attracted different majorities on different issues. First, the court held that Bahlul forfeited his challenge to his convictions under the constitutional provision that prohibits Congress from enacting any “ex post facto Law.” U.S. Const. art. I, § 9, cl. 3. As a result, the court reviewed his ex post facto challenge under a “plain error” standard. Second, the court ruled that the 2006 MCA “is unambiguous in its intent to authorize retroactive prosecution for the crimes enumerated in the statute—regardless of their pre-existing law-of-war status.” This element of the court’s holding overruled Hamdan II’s statutory holding. Third, the court proceeded to the constitutional ex post facto arguments under a plain error standard. It rejected Bahlul’s ex post facto challenge to his conspiracy conviction because (i) the conduct for which he was convicted was already criminalized under 18 U.S.C. § 2332(b), which makes it a crime to kill an American citizen outside the United States (and it is not “plain” that this doesn’t satisfy the ex post facto clause), and (ii) it is not “plain” that conspiracy was not historically triable by a commission under 10 U.S.C. § 821, which provides military commission jurisdiction “with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions.” Fourth, the court held that Bahlul’s other two convictions—for material support and solicitation—were plainly erroneous because it was “plain” that neither offense was triable by a military commission at the time of Bahlul’s conduct.

12b. Subsequently, in Al Bahlul v. United States, __ F.3d __ (D.C. Cir. 2015), the D.C. Circuit held, in a 2-1 decision, that it violates Article III of the Constitution for military commissions to adjudicate the crime of conspiracy. The court noted that federal criminal prosecutions fall within the judicial power of the federal courts, and it reasoned that, if a case falls within the federal judicial power, it must normally be tried before an Article III court. While noting that there are “limited exceptions” to this requirement based on historical practice and judicial precedent, and that one such exception is for law-of-war military commissions such as those used at Guantanamo, the court found that the crime of conspiracy does not fall within the scope of that exception. Relying heavily on reasoning in Ex parte Quirin (excerpted in the casebook at pages 693-98), the court concluded that the exception to Article III for law-of-war military commissions extends only to the trial of offenses against the international laws of war, and it noted that the government had conceded that conspiracy does not constitute such an offense. The court also concluded that there was insufficient historical practice to support the use of law-of-war military commissions to try non-international offenses, and that neither the Define and Punish Clause nor the Necessary and Proper Clause gave Congress the authority to allow for such use of the commissions.

In an extensive dissent, Judge Henderson argued that the issue should have been analyzed differently:
Mindful of . . . the inherently fluid nature of international law and the deference owed to the Congress’s power to define offenses against the law of nations—we should examine whether the international community permits Bahlul to be tried by military commission rather than requiring that the charge against him, as defined by the Congress, matches an offense expressly recognized by the law of nations as a war crime.

In her view, “Congress can, consonant with the Define and Punish Clause, track somewhat ahead of the international community.” She also thought that “the notion that international law dictates the operation of the separation of powers under our Constitution is outlandish.”