

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

United States Threatens Military Strikes Against Syria, Then Joins in Diplomatic Efforts to Control Syrian Chemical Weapons

On August 21, 2013, large numbers of Syrian civilians in several Damascus suburbs were killed by exposure to sarin nerve gas. U.S. officials believe that more than 1,400 people died. Although Syria and Russia insist that rebel opponents of the regime of President Bashar al-Assad carried out the gas attacks,¹ the U.S., British, and French governments insist that they were the work of Syrian government forces.² An investigation by a UN inspection team confirmed that large quantities of high-grade sarin were used in the attacks. The inspectors also recovered the remains of 330 mm gas-bearing rockets of a unique Syrian design and identified the trajectories of two rockets. These findings suggested that the rockets were launched from areas controlled by the regime's Republican Guard.³ Russian officials attacked the UN report as biased and incomplete.⁴

President Barack Obama and Secretary of State John Kerry responded to the attack in strong terms, with Kerry referring to "the indiscriminate slaughter of civilians" and denouncing the attacks as a "moral obscenity."⁵ The U.S. administration began planning limited military strikes on Syrian forces—intended to degrade Syria's ability to launch further chemical weapons attacks—both as punishment for the attacks and as a deterrent to further attacks.⁶ The administration did not offer a clear international law rationale for these proposed strikes. In a September 2013 address to the nation, Obama emphasized the importance of maintaining international limits on the use of chemical and other weapons of mass destruction.

The facts cannot be denied. The question now is what the United States of America, and the international community, is prepared to do about it. Because what happened to those people—to those children—is not only a violation of international law, it's also a danger to our security.

¹ Steven Lee Myers & Rick Gladstone, *Russia Calls U.N. Chemical Report on Syria Biased*, N.Y. TIMES, Sept. 19, 2013, at A6; Karen DeYoung, *Assad Insists Rebels Used Chemical Arms*, WASH. POST, Sept. 19, 2013, at A6.

² Craig Whitlock & Ed O'Keefe, *Assad's Regime Used Sarin Gas in Attack, U.S. Says*, WASH. POST, Sept. 2, 2013, at A1; White House Press Release, *Government Assessment of the Syrian Government's Use of Chemical Weapons on August 21, 2013* (Aug. 30, 2013), at <http://www.whitehouse.gov/the-press-office/2013/08/30/government-assessment-syriangovernment-s-use-chemical-weapons-august-21>.

³ Anne Gearan, Loveday Morris & Colum Lynch, *U.N. to Visit Site of Alleged Syrian Chemical Attack*, WASH. POST, Aug. 26, 2013, at A1; Rick Gladstone & C. J. Chivers, *U.N. Implicates Syria in Using Chemical Arms*, N.Y. TIMES, Sept. 17, 2013, at A1; Joby Warrick, *U.N. Findings Come Closer to Tying Assad to Gas Attack*, WASH. POST, Sept. 17, 2013, at A4; Colum Lynch & Karen DeYoung, *U.N. Team Finds 'Clear' Evidence of Sarin Attack*, WASH. POST, Sept. 17, 2013; C. J. Chivers, *Data in Gas Attack Points to Assad's Top Forces*, N.Y. TIMES, Sept. 18, 2013, at A1.

⁴ Myers & Gladstone, *supra* note 1.

⁵ Michael R. Gordon & Mark Landler, *Kerry Cites Clear Evidence of Chemical Weapon Use*, N.Y. TIMES, Aug. 27, 2013, at A1.

⁶ Karen DeYoung, *Obama Reviews Response Options to Attack in Syria*, WASH. POST Aug. 25, 2013, at A16; Karen DeYoung & Anne Gearan, *Obama Weighing Limited Strike on Syria*, WASH. POST, Aug. 27, 2013, at A1; Thom Shanker, C. J. Chivers & Michael R. Gordon, *Obama Weighing 'Limited' Strikes on Syrian Forces*, N.Y. TIMES, Aug. 28, 2013, at A1; Karen DeYoung & Anne Gearan, *Proof Against Assad at Hand*, WASH. POST, Aug. 28, 2013, at A1; Michael R. Gordon, *Aim of U.S. Attack: Restore a 'Red Line' That Became Blurred*, N.Y. TIMES, Aug. 30, 2013, at A9.

Let me explain why. If we fail to act, the Assad regime will see no reason to stop using chemical weapons. As the ban against these weapons erodes, other tyrants will have no reason to think twice about acquiring poison gas, and using them. Over time, our troops would again face the prospect of chemical warfare on the battlefield. And it could be easier for terrorist organizations to obtain these weapons, and to use them to attack civilians.

If fighting spills beyond Syria's borders, these weapons could threaten allies like Turkey, Jordan, and Israel. And a failure to stand against the use of chemical weapons would weaken prohibitions against other weapons of mass destruction, and embolden Assad's ally, Iran—which must decide whether to ignore international law by building a nuclear weapon, or to take a more peaceful path.

This is not a world we should accept. This is what's at stake. And that is why, after careful deliberation, I determined that it is in the national security interests of the United States to respond to the Assad regime's use of chemical weapons through a targeted military strike. The purpose of this strike would be to deter Assad from using chemical weapons, to degrade his regime's ability to use them, and to make clear to the world that we will not tolerate their use.⁷

However, faced with congressional calls for a voice in the decision to use force,⁸ Obama decided to seek congressional approval of the planned strikes.⁹ His decision came soon after a vote in the British Parliament against using British military forces in Syria.¹⁰ The president's call for military action drew widespread public and congressional opposition from both the right and the left, leaving prospects for congressional approval in doubt. The Senate Foreign Relations Committee approved an eleven-page resolution providing a limited authorization for the use of force as a matter of U.S. law,¹¹ but it faced vigorous opposition in the full Senate, and further Senate action was deferred.¹² Opposition appeared stronger in the House of Representatives.¹³

Events then moved rapidly. In a London news conference, Kerry suggested Syria could avoid U.S. strikes if its chemical weapons were placed under international control, an idea previously discussed by Kerry and his Russian counterpart and by Obama and Russian President Vladimir

⁷ White House Press Release, Remarks by the President in Address to the Nation on Syria (Sept. 10, 2013), at <http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>.

⁸ Karen DeYoung, *White House: Obama Can Go It Alone on Syria*, WASH. POST, Aug. 30, 2013, at A1.

⁹ White House Press Release, Statement by the President on Syria (Aug. 31, 2013), at <http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria>.

¹⁰ Anthony Faiola, *In Loss for Cameron, Parliament Rejects Push for Military Action*, WASH. POST, Aug. 30, 2013, at A6.

¹¹ S.J. Res. 21, 113th Cong. (Sept. 6, 2013), available at <http://www.foreign.senate.gov/imo/media/doc/S.%20J.%20Res.%2021.pdf>.

¹² Karen DeYoung & Ed O'Keefe, *Senate Sets Aside Authorization Resolution*, WASH. POST, Sept. 12, 2013, at A7.

¹³ Paul Kane & Ed O'Keefe, *Approval by Congress Far from a Guarantee*, WASH. POST, Sept. 1, 2013, at A13; Paul Kane & Ed O'Keefe, *Use of Force Will Be 'a Very Tough Sell'*, WASH. POST, Sept. 2, 2013, at A1; Michael Wines, *Proudly Patriotic but Skeptical on Syria Attack*, N.Y. TIMES, Sept. 6, 2013, at A1; Peter Wallsten, *As Obama Plans Push for Military Action, Backers Are Gloomy*, WASH. POST, Sept. 9, 2013, at A8; Mark Landler & Megan Thee-Brenan, *Survey Reveals Scant Backing for Syria Strike*, N.Y. TIMES, Sept. 10, 2013, at A1; Peter Baker, *Russian Proposal Catches Obama Between Putin and House Republicans*, N.Y. TIMES, Sept. 10, 2013, at A8; Joel Achenbach, *Once-Obvious Congressional Alliances Go out the Window*, WASH. POST, Sept. 11, 2013, at A13; Dan Balz & Peyton Craighill, *Poll Finds Strong Backing for Deal on Chemical Arms*, WASH. POST, Sept. 17, 2013, at A5.

Putin.¹⁴ Russia's foreign minister quickly endorsed this proposal, and Russia undertook to work with Syria to bring about international control of its chemical weapons to avert U.S. strikes.¹⁵ Obama agreed to pursue this effort.¹⁶ Syria promptly announced its willingness to place its chemical weapons under international control, publicly admitting for the first time that it had such weapons. Syria also indicated that it would accede to the Chemical Weapons Convention.¹⁷

A few days later, Kerry and Russia's foreign ministers met in Geneva for a short and intensive round of negotiations. These talks resulted in mid-September in an agreed "Framework for Elimination of Syrian Chemical Weapons," calling for identification and destruction of Syria's chemical weapons by mid-2014 with oversight by the Organisation for the Prohibition of Chemical Weapons (OPCW).¹⁸ The text of this framework follows:

Taking into account the decision of the Syrian Arab Republic to accede to the Chemical Weapons Convention and the commitment of the Syrian authorities to provisionally apply the Convention prior to its entry into force, the United States and the Russian Federation express their joint determination to ensure the destruction of the Syrian chemical weapons program (CW) in the soonest and safest manner.

For this purpose, the United States and the Russian Federation have committed to prepare and submit in the next few days to the Executive Council of the [Organisation for the Prohibition of Chemical Weapons (OPCW)] a draft decision setting down special procedures for expeditious destruction of the Syrian chemical weapons program and stringent verification thereof. The principles on which this decision should be based, in the view of both sides, are set forth in Annex A. The United States and the Russian Federation believe that these extraordinary procedures are necessitated by the prior use of these weapons in Syria and the volatility of the Syrian civil war.

The United States and the Russian Federation commit to work together towards prompt adoption of a UN Security Council resolution that reinforces the decision of the OPCW Executive Council. This resolution will also contain steps to ensure its verification and effective implementation and will request that the UN Secretary-General, in consultation with the OPCW, submit recommendations to the UN Security Council on an expedited basis regarding the UN's role in eliminating the Syrian chemical weapons program.

¹⁴ Peter Baker & Michael R. Gordon, *An Unlikely Evolution from Casual Proposal to Possible Resolution*, N.Y. TIMES, Sept. 11, 2013, at A8; Anne Gearan, *Offhand Remark Spurs Surprise Peace Proposal*, WASH. POST, Sept. 11, 2013, at A15; Walter Pincus, *Groundwork on Syria Deal Began Months Ago*, WASH. POST, Sept. 19, 2013, at A15.

¹⁵ Anne Gearan, Karen DeYoung & Will Englund, *Syria, Russia Accept Arms Control Idea*, WASH. POST, Sept. 10, 2013, at A1; Editorial, *A Diplomatic Proposal for Syria*, N.Y. TIMES, Sept. 10, 2013, at A18.

¹⁶ Michael D. Shear, Michael R. Gordon & Steven Lee Myers, *Obama Backs Idea to Cede Control of Arms*, N.Y. TIMES, Sept. 10, 2013, at A1; Mark Landler & Jonathan Weisman, *Obama Will Delay Syria Strike to Focus on Russian Arms Plan*, N.Y. TIMES, Sept. 11, 2013, at A1; White House Press Release, *Weekly Address: Pursuing a Diplomatic Solution in Syria* (Sept. 14, 2013), at <http://www.whitehouse.gov/the-press-office/2013/09/14/weekly-address-pursuing-diplomatic-solution-syria>.

¹⁷ Convention on the Prohibition, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. No. 103-21 (1993), 32 ILM 800 (1993); see also Anne Gearan, Karen DeYoung & Will Englund, *Syria Welcomes Russian Plan to Avert U.S. Strike*, WASH. POST, Sept. 10, 2013, at A1; Anne Barnard, *In Shift, Syrian Official Admits Government Has Chemical Arms*, N.Y. TIMES, Sept. 11, 2013, at A10.

¹⁸ Michael D. Shear & Michael R. Gordon, *U.S. and Russia Far Apart on Eve of Talks over Syria*, N.Y. TIMES, Sept. 12, 2013, at A10; Anne Gearan & Scott Wilson, *U.S.-Russia Deal Reached on Syrian Chemical Arsenal*, WASH. POST, Sept. 15, 2013, at A1; Karen DeYoung, *U.S.-Russia Deal on Syria Looked Unlikely Till a Poolside Chat*, WASH. POST, Sept. 16, 2013, at A7. Information about the OPCW is available online at www.opcw.org.

The United States and the Russian Federation concur that this UN Security Council resolution should provide for review on a regular basis the implementation in Syria of the decision of the Executive Council of the OPCW, and in the event of non-compliance, including unauthorized transfer, or any use of chemical weapons by anyone in Syria, the UN Security Council should impose measures under Chapter VII of the UN Charter.

The proposed joint US-Russian OPCW draft decision supports the application of Article VIII of the Chemical Weapons Convention, which provides for the referral of any cases of non-compliance to the United Nations General Assembly and the United Nations Security Council.

In furtherance of the objective to eliminate the Syrian chemical weapons program, the United States and the Russian Federation have reached a shared assessment of the amount and type of chemical weapons involved, and are committed to the immediate international control over chemical weapons and their components in Syria. The United States and the Russian Federation expect Syria to submit, within a week, a comprehensive listing, including names, types, and quantities of its chemical weapons agents, types of munitions, and location and form of storage, production, and research and development facilities.

We further determined that the most effective control of these weapons may be achieved by removal of the largest amounts of weapons feasible, under OPCW supervision, and their destruction outside of Syria, if possible. We set ambitious goals for the removal and destruction of all categories of CW related materials and equipment with the objective of completing such removal and destruction in the first half of 2014. In addition to chemical weapons, stocks of chemical weapons agents, their precursors, specialized CW equipment, and CW munitions themselves, the elimination process must include the facilities for the development and production of these weapons. The views of both sides in this regard are set forth in Annex B.

The United States and the Russian Federation have further decided that to achieve accountability for their chemical weapons, the Syrians must provide the OPCW, the UN, and other supporting personnel with the immediate and unfettered right to inspect any and all sites in Syria. The extraordinary procedures to be proposed by the United States and the Russian Federation for adoption by the OPCW Executive Council and reinforced by a UN Security Council resolution, as described above, should include a mechanism to ensure this right.

Under this framework, personnel under both the OPCW and UN mandate should be dispatched as rapidly as possible to support control, removal, and destruction of Syria's chemical weapons capabilities.

The United States and the Russian Federation believe that the work of the OPCW and the UN will benefit from participation of the experts of the P5 countries.

The United States and the Russian Federation strongly reiterate their position on Syria as reflected in the Final Communiqué of the G-8 Summit in Northern Ireland in June 2013, especially as regards chemical weapons.

The two sides intend to work closely together, and with the OPCW, the UN, all Syrian parties, and with other interested member states with relevant capabilities to arrange for the security of the monitoring and destruction mission, recognizing the primary responsibility of the Syrian Government in this regard.

The United States and the Russian Federation note that there are details in furtherance of the execution of this framework that need to be addressed on an expedited basis in the coming days and commit to complete these details, as soon as practicable, understanding that time is of the essence given the crisis in Syria.¹⁹

Annex A sets out the “Principles for Decision Document by OPCW Executive Council,” governing the disclosure and destruction of Syria’s chemical weapons. An excerpt follows:

5. The decision should specify which initial information Syria shall submit to the OPCW Technical Secretariat in accordance with a tightly fixed schedule and also specifies an early date for submission of the formal CWC declaration.
6. The decision should oblige Syria to cooperate fully on all aspects of its implementation.
7. The decision should address a schedule for the rapid destruction of Syrian chemical weapons capabilities. This schedule should take into account the following target dates:
 - A. Completion of initial OPCW on-site inspections of declared sites by November.
 - B. Destruction of production and mixing/filling equipment by November.
 - C. Complete elimination of all chemical weapons material and equipment in the first half of 2014.

The shortest possible final deadline, as well as intermediate deadlines, for the destruction of Syrian chemical weapons capabilities should be included into the schedule.

8. The decision should provide stringent special verification measures, beginning within a few days, including a mechanism to ensure the immediate and unfettered right to inspect any and all sites.²⁰

Annex B sets out a “Joint Framework on Destruction of Syrian [Chemical Weapons].” An excerpt follows:

We agree on the importance of rapid destruction of the following categories:

1. Production equipment
2. Mixing and filling equipment
3. Filled and unfilled weapons and delivery systems
4. Chemical agents (unweaponized) and precursor chemicals. For these materials, they will pursue a hybrid approach, i.e., a combination of removal from Syria and destruction within Syria, depending upon site-specific conditions. They will also consider the possibility of consolidation and destruction in the coastal area of Syria.
5. Material and equipment related to the research and development of chemical weapons.

....

¹⁹ U.S. Dep’t of State Press Release No. 2013/1121, Framework for Elimination of Syrian Chemical Weapons (Sept. 14, 2013), available at <http://www.state.gov/r/pa/prs/ps/2013/09/214247.htm>.

²⁰ *Id.*

[The parties] agree that the elimination of chemical weapons in Syria should be considered an urgent matter to be implemented within the shortest possible time period.

The parties agree to set the following target dates:

- A. Completion of initial OPCW on-site inspections by November.
- B. Destruction of production and mixing/filling equipment by November.
- C. Complete elimination of all chemical weapons material and equipment in the first half of 2014.

The Russian Federation and the United States will work together closely, including with the OPCW, the UN and Syrian parties to arrange for the security of the monitoring and destruction mission, noting the primary responsibility of the Syrian government in this regard.²¹

Soon after, Syria deposited its instrument of accession to the Chemical Weapons Convention, submitted a substantial initial declaration regarding its chemical weapons to the OPCW, and effectively coordinated with OPCW officials.²² Following a week of intensive negotiations, including direct meetings and contacts between Kerry and Russia's foreign minister,²³ the Security Council unanimously agreed on a strongly worded resolution requiring Syria to dismantle its chemical weapons or face unspecified consequences.²⁴ During the negotiations, Russia opposed including language authorizing action under Chapter VII of the UN Charter in case of Syrian noncompliance.²⁵ As adopted, operative paragraph 21 of the resolution provides that the Council will "impose measures under Chapter VII" in case of future use or transfer of chemical weapons but leaves the nature of any such measures for future determination. Excerpts from the resolution follow:

The Security Council,

...

Determining that the use of chemical weapons in the Syrian Arab Republic constitutes a threat to international peace and security,

²¹ *Id.*

²² Michael R. Gordon & Nick Cumming-Bruce, *Syria Meets First Test of Accord on Weapons*, N.Y. TIMES, Sept. 21, 2013, at A5; Karen DeYoung & Colum Lynch, *Syria Submitting Data on Weapons*, WASH. POST, Sept. 21, 2013, at A8; Michael Birnbaum, *Chemical Weapons Officials Cite 'Efficient' Coordination with Syrian Regime*, WASH. POST, Sept. 30, 2013, at A8.

²³ Anne Gearan, *Kerry, Lavrov Had Intense Talks Ahead of U.N. Vote on Syria*, WASH. POST, Sept. 29, 2013, at A8.

²⁴ Michael R. Gordon, *Key Nations at U.N. Reach Agreement on Syria Weapons*, N.Y. TIMES, Sept. 27, 2013, at A1; Editorial, *Some Progress on Syria*, N.Y. TIMES, Sept. 27, 2013, at A20; Colum Lynch & Anne Gearan, *U.N. Powers Agree on Syrian Chemical Weapons Resolution*, WASH. POST, Sept. 27, 2013, at A16; Rick Gladstone & Somini Sengupta, *Swift Movement Is Seen on Syria After U.N. Action*, N.Y. TIMES, Sept. 28, 2013, at A7; Colum Lynch & Anne Gearan, *U.N. Security Council Approves Resolution on Syrian Arms*, WASH. POST, Sept. 28, 2013, at A10.

²⁵ Rick Gladstone, *Security Council Returns to Role in Syria Conflict*, N.Y. TIMES, Sept. 18, 2013, at A8; Karen DeYoung, *Assad Insists Rebels Used Chemical Arms*, WASH. POST, Sept. 19, 2013, at A6; Michael R. Gordon, *Kerry Presses Security Council to Act on Syrian Arsenal*, N.Y. TIMES, Sept. 20, 2013, at A6; Karen DeYoung, *Kerry Urges U.N. Action as Syria Deal Hits Rough Spots*, WASH. POST, Sept. 20, 2013, at A3; Sheryl Gay Stolberg, *A New U.S. Player, Put on World Stage by Syria*, N.Y. TIMES, Sept. 23, 2013, at A1; Colum Lynch, *As Obama Prepares for U.N. Speech, Experts Say His Approach Fits a Pattern*, WASH. POST, Sept. 23, 2013, at A8.

Underscoring that Member States are obligated under Article 25 of the Charter of the United Nations to accept and carry out the Council's decisions,

1. *Determines* that the use of chemical weapons anywhere constitutes a threat to international peace and security;
 2. *Condemns* in the strongest terms any use of chemical weapons in the Syrian Arab Republic, in particular the attack on 21 August 2013, in violation of international law;
 3. *Endorses* the decision of the OPCW Executive Council 27 September 2013,²⁶ which contains special procedures for the expeditious destruction of the Syrian Arab Republic's chemical weapons program and stringent verification thereof and calls for its full implementation in the most expedient and safest manner;
 4. *Decides* that the Syrian Arab Republic shall not use, develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to other States or non-State actors;
 5. *Underscores* that no party in Syria should use, develop, produce, acquire, stockpile, retain, or transfer chemical weapons;
 6. *Decides* that the Syrian Arab Republic shall comply with all aspects of the decision of the OPCW Executive Council of 27 September 2013 (Annex I);
 7. *Decides* that the Syrian Arab Republic shall cooperate fully with the OPCW and the United Nations, including by complying with their relevant recommendations, by accepting personnel designated by the OPCW or the United Nations, by providing for and ensuring the security of activities undertaken by these personnel, by providing these personnel with immediate and unfettered access to and the right to inspect, in discharging their functions, any and all sites, and by allowing immediate and unfettered access to individuals that the OPCW has grounds to believe to be of importance for the purpose of its mandate, and *decides* that all parties in Syria shall cooperate fully in this regard;
- ...
15. *Expresses* its strong conviction that those individuals responsible for the use of chemical weapons in the Syrian Arab Republic should be held accountable;
 16. *Endorses* fully the Geneva Communiqué of 30 June 2012 (Annex II), which sets out a number of key steps beginning with the establishment of a transitional governing body exercising full executive powers, which could include members of the present Government and the opposition and other groups and shall be formed on the basis of mutual consent;
 17. *Calls* for the convening, as soon as possible, of an international conference on Syria to implement the Geneva Communiqué, and calls upon all Syrian parties to engage seriously and constructively at the Geneva Conference on Syria, and *underscores* that they should be fully representative of the Syrian people and committed to the implementation of the Geneva Communiqué and to the achievement of stability and reconciliation;
- ...
21. *Decides*, in the event of non-compliance with this resolution, including unauthorized transfer of chemical weapons, or any use of chemical weapons by anyone in

²⁶ [Editor's note: The OPCW Executive Council's decision on destruction of Syrian chemical weapons is included as Annex I to the resolution.]

the Syrian Arab Republic, to impose measures under Chapter VII of the United Nations Charter²⁷

D.C. Circuit Rules Statute Authorizing “Israel” as Place of Birth on Passports of Citizens Born in Jerusalem Is Unconstitutional

The U.S. Department of State issues U.S. passports. Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003,¹ directs the secretary of state to list Israel on passports as the birthplace of a U.S. citizen born in Jerusalem if the citizen or citizen’s guardian so requests.² Beginning with President Harry Truman in 1948, successive U.S. administrations have not recognized Israeli sovereignty over Jerusalem or Jerusalem as the capital of Israel, maintaining that the city’s status must be determined by negotiations.³ President George W. Bush signed the legislation containing section 214(d) in 2002, but issued a signing statement contending that the section impermissibly interferes with the president’s constitutional authority to conduct U.S. foreign affairs.⁴ Section 214(d) has not been enforced.

Menachem Zivotofsky was born to U.S. parents in Jerusalem in 2002. His mother asked the State Department to record his place of birth as “Jerusalem, Israel.” The request was denied, and in accordance with State Department regulations in the Foreign Affairs Manual (FAM), the passport was issued showing “Jerusalem” as the place of birth. The Zivotofskys then sued the secretary of state. Following multiple proceedings in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit, the court of appeals in 2009 affirmed the district court’s ruling that the case posed a nonjusticiable political question.⁵ In March 2012, the U.S. Supreme Court by a vote of 8-1 (Justice Stephen Breyer dissenting) reversed the D.C. Circuit, finding the claims to be justiciable.⁶ The Supreme Court remanded the case to the D.C. Circuit to consider the government’s contention that the statute unconstitutionally interferes with the president’s “exclusive authority under the United States Constitution to decide whether and on what terms to recognize foreign nations.”⁷

In July 2013, a three-judge panel of the D.C. Circuit⁸ upheld the government’s position, finding that section 214(d) unconstitutionally interferes with the president’s recognition power.⁹ After summarizing the extensive earlier litigation, the court addressed the government’s claim that the statute interfered with the president’s recognition power. It cited several venerable U.S. authorities discussing recognition and its consequences.

²⁷ SC Res. 2118 (Sept. 27, 2013).

¹ Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002).

² Section 214(d) provides: “RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES.— For 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.”

³ *Zivotofsky v. Sec’y of State*, 725 F.3d 197, 200 (D.C. Cir. 2013).

⁴ Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 38 WEEKLY COMP. PRES. DOC. 1658–60 (Sept. 30, 2002), available at <http://www.gpo.gov/fdsys/pkg/WCPD-2002-10-07/pdf/WCPD-2002-10-07-Pg1658-2.pdf>.

⁵ *Zivotofsky v. Sec’y of State*, 571 F.3d 1227 (D.C. Cir. 2009).

⁶ *Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012); see John R. Crook, *Contemporary Practice of the United States*, 105 AJIL 775, 814 (2011); 106 AJIL 643, 644 (2012).

⁷ *Zivotofsky*, 725 F.3d at 197.

⁸ Circuit Judges Karen LeCraft Henderson, Judith W. Rogers, and David S. Tatel comprised the panel.

⁹ See Ann E. Marimow, *Congress Overstepped, Court Rules*, WASH. POST, July 24, 2013, at A3.