This Report summarizes an opinion issued on June 8, 2015 (Part I); and cases granted review on that date (Part II).

I. Opinions

- **Zivotofsky v. Kerry, 13-628.** By a 5-1-3 vote, the Court held that the President has exclusive power to grant formal recognition to foreign sovereigns, and that §214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, unconstitutionally infringes on this power by directing the President and Secretary of State to issue a formal statement that contradicts an earlier recognition decision regarding the status of Jerusalem. In 1948, President Truman formally recognized Israel in a signed statement of “recognition,” but the statement did not recognize Israel’s sovereignty over Jerusalem; no President since Truman has done so. The Executive Branch has instead maintained that the status of Jerusalem should be decided by all interested parties. This policy is reflected in the State Department’s treatment of passports and consular reports of birth abroad. Although the State Department generally instructs its employees to record as the place of birth on a passport the country having sovereignty over the actual area of birth, employees are instructed to list only “Jerusalem” as the place of birth for citizens born there. In 2002, Congress sought to change this practice by enacting §214(d). It requires the State Department to list “Israel” as the place of birth on a passport for a citizen born in Jerusalem if the citizen or citizen’s guardian requests that it do so. Petitioner Menachem Binyamin Zivotofsky was born to United States citizens living in Jerusalem. When his mother requested a passport and consular report of birth abroad for her son, she asked that his place of birth be listed as “Jerusalem, Israel.” American Embassy employees told her that under State Department policy the passport would list only “Jerusalem.” Zivotofsky’s parents objected and sued on his behalf under §214(d), seeking to have “Israel” listed as the place of birth on his passport. Eventually (following an earlier trip to the Supreme Court and remand), the D.C. Circuit held that §214(d) is unconstitutional because it contradicts the President’s exclusive power to recognize a foreign sovereign. In an opinion by Justice Kennedy, the Court affirmed, holding that the President possesses the recognition power, that power is exclusive, and §214(d) infringes it.

The Court started with the “familiar tripartite framework” from Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 57 (1952), which divides exercises of Presidential power into three categories. Here, because the President’s action went against the express will of Congress, it fell into the third category. This meant the President’s power was “at its lowest” ebb and could prevail only if the power was both “exclusive” and “conclusive” on the issue. The Court held that it was, based on the Constitution’s text and structure, the Court’s precedent, and “accepted understandings and practice.” The Court first pointed to the Reception Clause, which states that the President “shall receive Ambassadors and other public Ministers.” Art. II, §3. The Court noted that while the Reception Clause “received little attention at the Constitutional Convention,” at the time of the founding “prominent international scholars” suggested that receiving an ambassador was tantamount to recognizing the sovereignty of that state. The Court reasoned that the Reception Clause would have been “understood to acknowledge [the President’s] power to recognize other nations”—which actually occurred when President Washington recognized the French Revolutionary Government by receiving its ambassador. The Court found more support
for the President’s recognition power in the structure of Article II, which leaves to the President the
power to negotiate treaties, nominate ambassadors, dispatch other diplomatic agents, and engage
in direct diplomacy with foreign heads of state and their ambassadors. The Court concluded that
Article II “thus assigns the President means to effect recognition on his own initiative.”

The Court then turned to whether this power is “exclusive.” The Court determined that “the
various ways in which the President may unilaterally effect recognition,” coupled with Congress’s
lack of any similar power, suggests that the power is exclusive. Functional considerations also
suggest that because, the Court determined, “[r]ecognition is a topic on which the Nation must
speak with one voice.” And that voice, the Court held, “must be the President’s.” The Court con-
cluded that, between the two political branches, only the Executive is capable of speaking with unity
and engaging in delicate and even secret diplomatic contacts, and is better positioned to take
decisive actions. The President has also, since the founding, “exercised this unilateral power to
recognize new states.” Thus, while “Congress has an important role in other aspects of foreign
policy,” a “clear rule” that the recognition power is exclusively the President’s “serves a necessary
purpose in diplomatic relations.”

Turning to its own precedents, the Court explained that while no “single precedent resolves
the question,” that was partly because “political branches have [usually] resolved their disputes
over questions of recognition.” But the Court noted language from prior cases that, while “not direct
holdings,” offered “strong support” for the exclusivity of the President’s recognition power. Among
those was United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), which described the
President as “the sole organ of the federal government in the field of international relations.” The
Court declined to “acknowledge th[e] unbounded power” asserted by the Secretary in reliance on
Curtiss-Wright, stating “it is essential [that] 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 deter-
mine the whole content of the Nation’s foreign policy.” Still, held the Court, the President does have
exclusive power on the specific decision of recognition. “Recognition is an act with immediate and
powerful significance for international relations, so the President’s position must be clear” and free
from congressional muddying. In further support, the Court found it “appropriate” to look at accept-
ed historical practice because, in separation-of-powers cases, it had “often put significant weight
upon historical practice.” And “the balance” of historical practice “provide[d] strong support” for the
exclusivity of the President’s power. As the Court explained, “[f]rom the first Administration forward,
the President has claimed unilateral authority to recognize foreign sovereigns,” while for the most
part “congress has acquiesced” in that power.

The Court then turned to whether §214(d) unconstitutionally infringes on the President’s ex-
clusive recognition power. The Court held that it does, explaining that §214(d)’s command that the
Secretary, on request, list “Israel” as the place of birth for a citizen born in Jerusalem “directly
contradicts the carefully calibrated and longstanding Executive Branch policy of neutrality toward
Jerusalem” (internal quotation marks omitted). Continuing, the Court wrote that “[i]f 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.” The Court viewed this conclusion as “a matter of common sense and necessity,” because “if Congress could alter the President’s [recognition statements] or force him to contradict them, Congress in effect would exercise the recognition power.” The Court buttressed its conclusion with two points. First, the Secretary has consistently treated the place-of-birth section on passports “as an official statement implicating recognition” by refusing to place information in that section that “contradicts the President’s recognition policy.” Second, “the purpose of the statute was to infringe on the recognition power,” as evidenced by its title (“United States Policy With Respect to Jerusalem as Capital of Israel”), legislative history (describing §214 as containing “four provisions related to the recognition of Jerusalem as Israel’s capital”), and its reception abroad (protests from the Palestinian government and people). (In the court of appeals, Zivotofsky waived any argument that his consular report of birth abroad should be treated any differently than his passport, and he did not differentiate between the two documents in his argument before the Supreme Court. The Court therefore focused on Zivotofsky’s passport arguments and declined to conduct a separate analysis for the consular report of birth abroad.) Justice Breyer issued a one-paragraph concurring opinion that noted his continuing belief that this was a nonjusticiable political question but otherwise joined the majority’s conclusion.

Justice Thomas filed a lengthy opinion concurring in the judgment in part and dissenting in part. He maintained that neither party and none of the other Justices “ha[ve] 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.” In reaching those conclusions, Justice Thomas asserted that the Vesting Clause of Article II—which provides that “[t]he executive Power shall be vested in a President of the United States”—grants the President a residual power that “includes all powers originally understood as falling within the ‘executive Power’ of the Federal Government,” including “the foreign affairs power of a sovereign State.” Justice Thomas found that passport issuance is a part of that residual presidential power. By contrast, he argued, nothing in Article I grants Congress the authority to enact §214(d). “The Constitution contains no Passport Clause”; passports do not directly regulate commerce and are not part of the naturalization process; and §214(d) is not a “necessary and proper” means of implementing those powers because it has only an indirect relationship to them and would upset the Constitution’s allocation of powers. Justice Thomas further found, however, that consular reports of birth have been “historically associated with naturalization, not foreign affairs”—the regulation of which the Constitution empowers Congress, not the President.

Justice Scalia filed the principal dissenting opinion, which Chief Justice Roberts and Justice Alito joined. He found that Congress acted under its Article I naturalization power, which “enables Congress to furnish people it makes citizens with papers verifying their citizenship,” be it through a
consular report or a passport. He further found (as the majority did) “that the Constitution empowers the President to extend recognition on behalf of the United States.” But he believed that the question whether that power is exclusive is far harder than the majority suggested: “Neither text nor history nor precedent yields a clear answer . . . .” Justice Scalia concluded, though, that there is “no need to confront these matters today . . . because §214(d) plainly does not concern recognition.” In his view, recognition “is a formal legal act with effects under international law”: “[i]t signifies acceptance of an international status, and it makes a commitment to continued acceptance of that status and respect for any attendant rights.” Section 214(d), he maintained, concerns none of that. Rather than formally declaring the United States’ position on sovereignty over Israel, it “performs [the] more prosaic function” of accommodating a passport bearer’s request regarding the listed birthplace. And while the symbolism of the provision “may have tremendous significance as a matter of international diplomacy, [that] 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.” By holding to the contrary, the majority opinion “will erode the structure of separated powers that the People established for the protection of their liberty.” Justice Scalia went on to criticize Justice Thomas’ concurring opinion, calling it a “stingy interpretation of enumerated powers” that (quoting *McCulloch v. Maryland*) forgets “that it is a constitution we are expounding.” He called Justice Thomas’ approach to the Necessary and Proper Clause “upside down” and closed by stating that Justice Thomas’ approach yields “a presidency more reminiscent of George III than George Washington.”

Chief Justice Roberts filed a separate dissenting opinion, which Justice Alito joined, “to underscore the stark nature of the Court’s error on a basic question of separation of powers.” In particular, he criticized the Court for finding that §214(d) trenches upon the President’s recognition power, even assuming it is exclusive. “At most, the majority worries that there may be a perceived contradiction based on a mistaken understanding of the effect of §214(d).” By so holding, the majority effectively adopts the position it “purports to reject”: that the President has the “exclusive authority to conduct diplomatic relations.” “But,” he insists, “our precedents”—including *Curtiss-Wright*—“have never accepted such a sweeping understanding of executive power.”

II. Cases Granted Review

* Tyson Foods, Inc. v. Bouaphakeo, 14-1146. The two questions presented are: (1) “Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.” (2) “Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.” Workers on the Slaughter and Processing floors of a Tyson Foods meat-processing plant filed suit alleging that Tyson failed to pay them for all time spent walking to their worksites and donning and doffing protective equipment. Tyson paid these
employees through a “gang-time” system, “which compensates them from the time the first piece of product passes their work stations until the last piece of product does so.” Tyson also paid them a fixed amount of extra time that compensated for donning and doffing-related activities—4 minutes per day for some years; 8 minutes per day in other years. Plaintiffs alleged that their donning, doffing, and walking time exceeded 4 and 8 minutes, and that they would have been entitled to overtime pay if the full donning/doffing time was counted. Over Tyson’s objection, the district court certified a Rule 23(b)(3) class and an FLSA collective action. Plaintiffs proved their case through an expert who determined the average time for donning, doffing, and walking by measuring how much time a sample of employees took for each of those activities. He calculated an average time of 18 minutes on the Processing floor and 21.25 minutes on the Slaughter floor. Plaintiffs then calculated damages through a report by a second expert who, after assuming that all class members spent those average amounts of time, used a computer program to determine how much overtime compensation each employee was due if credited with those additional hours. The jury awarded total damages of $2,892,378.70—about 35% of the damages computed by plaintiffs’ expert. The district court denied Tyson’s motion to decertify the class, and the Eighth Circuit affirmed. 765 F.3d 791. The Eighth Circuit denied en banc review by a 6-5 vote.

Tyson argues that “[t]he undisputed evidence in this case showed that there was substantial variance in the amount of time individual employees spent in donning/doffing-related activities each day.” In its view, “Wal-Mart [Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011)], makes clear that a damages model based on averaging is a flawed approach that cannot be used to avoid individualized inquiries and permit liability and damages to be measured on a classwide basis.” The averaging method permitted by the district court deprived Tyson of its “right to show the jury that individual class members had no unpaid overtime”—either because that employee spent less time on donning/doffing-related activities than the average or he was compensated for that time (e.g., because he performed them when his “gang time” had started). Instead, Tyson says, it “was reduced to attacking the methodology used by plaintiffs’ experts to determine the ‘average’ donning/doffing time.” On the second question presented, Tyson notes that plaintiffs’ expert conceded that “the class contained at least 212 employees who were not injured because they did not work any unpaid overtime even under [the other expert’s] assumed averages.” Tyson maintains that “circuit courts disagree about whether plaintiffs must show that all class members were injured by defendants’ allegedly unlawful actions, or whether a class may be certified even though it includes members who were not injured and thus have no claim for damages.” In its view, “[a] defendant should not be compelled to pay damages to those who are not injured[.]”

Respondents (the plaintiffs) rely—as the Eighth Circuit did—on Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946). In Mt. Clemens, the Court held that where the employer failed to keep records of time worked, a group of employees could prove the amount of time they worked “as a matter of just and reasonable inference.” Respondents insist that the district court and Eighth Circuit merely applied Mt. Clemens and allowed “just and reasonable inferences from representative proof.” They distinguish Wal-Mart as a case where the core issue was whether the company discriminated against class members—something that, absent a common discriminatory policy, could not be proven through a “sample” determination that some plaintiffs had been discriminated
against. Respondents also insist that the class “did not rely on representative proof alone,” but also “used individual employee time records.” On the second question, respondents assert that the “Court’s repeated recognition that Article III does not require that all plaintiffs have standing” supports the decisions of those circuits that have held that “a class need not show, as a prerequisite to certification, that all class members necessarily suffered injury.”

Shapiro v. Mack, 14-990. The Court will consider whether a single-judge district court may dismiss a complaint subject to the Three-Judge Court Act, 28 U.S.C. §2284, based on its conclusion that the complaint fails to state a claim on which relief can be granted. The Three-Judge Court Act requires “[a] district court of three judges” to hear any case “challenging the constitutionality of the apportionment of congressional districts” and certain actions under the Voting Rights Act and other federal statutes—unless the judge to whom the case is initially presented “determines that three judges are not required.” Id. §2284(a),(b)(1). The Court has (according to the petition) read the statute to permit a single judge to dismiss a case only if the constitutional claims are “insubstantial,” such that the district court lacks general subject-matter jurisdiction. McLucas v. DeChamplain, 421 U.S. 21, 28 (1975); Goosby v. Osser, 409 U.S. 512, 518 (1973). In this context, the Court stated, “insubstantial” means “obviously frivolous” and “obviously without merit” as judged by prior Court decisions. Under Goosby, “previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of [the Three-Judge Court Act].”

Petitioners, a self-described “bipartisan group of concerned Marylanders,” filed a complaint in district court alleging that partisan gerrymandering in Maryland’s 2011 congressional redistricting plan violated their First Amendment right of political association and other constitutional rights. A single district judge dismissed the case under Federal Rule of Civil Procedure 12(b)(6) for failing to state a claim on which relief could be granted. The district judge acknowledged the “substantial question” standard, but reasoned that “in the present context, the ‘substantial question’ standard and the legal sufficiency standard [under Rule 12(b)(6)] are one and the same.” The judge quoted the Fourth Circuit’s statement in Duckworth v. State Administration Board of Election Laws, 332 F.3d 769, 772-73 (2003), that when “pleadings do not state a claim, then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court.” The Fourth Circuit summarily affirmed.

Petitioners argue that the Duckworth rule “is flatly inconsistent with th[e] Court’s precedent in two separate respects.” First, they argue that Duckworth contravenes Goosby by equating the insubstantiality standard—which permits only obviously meritless claims to be dismissed for lack of jurisdiction—to the Rule 12(b)(6) standard. The latter standard, however, tests the legal sufficiency of the claims and thus “calls for a judgment on the merits and not for a dismissal for want of jurisdiction” (quoting Hagans v. Lavine, 415 U.S. 528, 542 (1974)). The result, according to petitioners, is that Duckworth “permits precisely what Goosby forbids: It allows a single-judge court to refuse to refer a non-frivolous complaint to a three-judge court based upon ‘previous decisions that merely render claims of doubtful or questionable merit.’” Second, petitioners argue that Duckworth conflicts with Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962) (per curiam), by requiring courts of appeals to rule on the merits of cases that should have been decid-
ed by a three-judge district court. The Supreme Court has exclusive, mandatory jurisdiction over appeals from cases decided by a three-judge district court; “a court of appeals [is] precluded from reviewing on the merits a case which should have originally been determined by a court of three judges.” Petitioner argues that Duckworth “turns [this] settled jurisdictional framework on its head” because the Fourth Circuit “must review the merits of any case dismissed under Rule 12(b)(6), even when the court ultimately determines that the dismissal was erroneous and a three-judge court should have been convened.” Respondents, Maryland elections officials, argue that the case was properly dismissed as insubstantial because petitioners’ various constitutional theories are similar to those previously rejected by the Court in Veith v. Jubelirer, 541 U.S. 267 (2004).

- Luis v. United States, 14-419. At issue is whether the pretrial restraint of a criminal defendant’s untainted assets—those not tied to a criminal offense—needed to retain counsel of choice violates the Fifth or Sixth Amendments. Petitioner Sila Luis, along with two co-defendants, owned and operated two home health-care agencies, both of which were enrolled health-care providers with Medicare. A grand jury indicted him on charges for conspiracy to commit health-care fraud and related offenses. The indictment alleged that those offenses resulted in $45 million of improper Medicare benefits being paid to petitioner’s agencies. The government therefore sought criminal forfeiture under 18 U.S.C. §982, which requires forfeiture to the United States of the proceeds of “a Federal health care offense” or, if such forfeitable property cannot be located, the forfeiture of substitute assets, i.e., property of an equivalent value. To preserve those assets for later forfeiture, federal law also allows the government to institute a civil action to restrain the defendant’s use of his assets. 18 U.S.C. §1345. Critically here, §1345 authorizes the restraint of property traceable to the commission of the offense or assets of equivalent value. The government filed a §1345 action here. The district court entered a temporary restraining order freezing up to $45 million of petitioner’s assets. Petitioner moved to release funds from the restraining order to pay her attorney, claiming the restraint violated her Sixth Amendment rights because she could not hire counsel of her choice without those funds. At an evidentiary hearing, petitioner and the government stipulated that an “unquantified amount” of revenue, unconnected to the indictment, had “flowed” into some of the restrained accounts and real estate. The district court denied petitioner’s motion and converted the temporary restraining order into a preliminary injunction. The Eleventh Circuit affirmed, holding that petitioner’s Sixth Amendment claims were “foreclosed” by Kaley v. United States, 134 S. Ct. 1090 (2014), Caplin & Drysdale Chartered v. United States, 491 U.S. 617 (1989), and United States v. Monsanto, 491 U.S. 600 (1989).

Petitioner contends that the Court’s precedents stand merely for the proposition that tainted assets may be restrained pretrial even where that prevents a criminal defendant from retaining counsel of choice. Petitioner argues that Kaley, Caplin, and Monsanto all involved assets that were either “allegedly traceable to, or the instrumentalities of, a crime.” Those cases establish that the restraint of tainted assets does not violate the Sixth Amendment because, under the “relation-back” doctrine, proceeds traceable to the offense do not belong to the defendant in the first place and the government has a right to property traceable to a crime. But the relation-back doctrine, petitioner argues, does not apply to untainted assets because such assets are owned by the defendant irrespective of the crime; the government therefore has no right to such property. She
adds that while the *Kaley* majority did “not opine on the matter,” the dissent “expressed agreement that the Constitution requires tracing the restrained asset to the charged crime.” And she further asserts that the Solicitor General, in oral argument for *Kaley*, conceded that a defendant has a constitutional right to a hearing on whether restrained property is traceable to a crime—which implies that if property is *not* traceable to a crime, it cannot be restrained. Petitioner also contends that the opinion will “embolden” prosecutors to “aggressively target legitimate assets for restraint,” which will “make it difficult, if not impossible, to retain any private counsel at all.”

The United States, in opposing certiorari, argues that *Caplin* and *Monsanto* establish that if the government can show probable cause that assets are forfeitable, a statutorily authorized restraint of a defendant’s assets does not violate the Constitution. The United States stresses that the Court has “repeatedly recognized” that the “relevant characteristic” for such assets is not whether they were “tainted,” but whether they were forfeitable by statute. That is why, the Solicitor General argues, there was no relevant concession made in the oral argument for *Kaley*. Instead, the Solicitor General had explained that when the rationale invoked for pretrial restraint is that the assets are traceable to the crime, a defendant is entitled to a hearing on that traceability. But when the restraint is on substitute assets, as is the case here, no such “taint” inquiry is required; at most, a defendant can try to show that restraint on substitute assets is improper for other reasons, *e.g.* because the value of the substitute assets exceeds the value of the dissipated assets. In sum, the United States asserts that a contrary holding could allow a defendant to “effectively deprive her victims of any opportunity for compensation simply by dissipating her ill-gotten gains.”
The Supreme Court Report is published weekly during the U.S. Supreme Court Term by the NAAG Supreme Court Project.

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