Brief in Favor of Respondent-Sarah Al-shalash and Fabiha Rahman

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Summary of Argument: The question the court is faced with in this particular case is two-pronged. Most obviously: who has the authority to recognize foreign nations? But also: who has the authority to propose foreign policy initiatives in the first place? Both questions must be addressed fully before the court can make a decision. The answers may seem complicated, but their foundation is bolstered by both years of political precedent and the language and the language of the Constitution itself. First, while the powers that dictate interaction between the United States and foreign nations have been divided between both the Legislative and Executive branches fairly evenly within the Constitution, a closer examination of the articles themselves reveals that the power to recognize nations– the authority currently in question, has been given to the Executive branch. And second, while the Constitution comes to no conclusive decision as to which branch should be the primary

arm of foreign policy initiatives, precedent demonstrates that that authority also falls upon Executive branch. That Congress would both propound and mandate the Secretary of State to, in effect, recognize a disputed area, is a two-front violation of the balance of powers established both by time and by the Constitution itself.

The question that must be addressed primarily– the heart of the issue surrounding this case, is that of recognition. Who has that authority that is so central to all foreign policy, that is the backbone, essentially, of all interactions between our nation and the world: the power to recognize nations, governments, and sovereignty?

The answer, at first, seems like it would be rather difficult to ascertain. Neither the Executive nor Legislative branches, any Constitutional expert can tell you, has been given full authority in the arena of foreign policy and international relations. The Legislative branch is delegated the tasks of, according to Article 1 of the Constitution, declaring war, regulating international commerce and the value of foreign currency, and to define and punish "Offenses against the Law of Nations". The Executive branch, in Article 2 of the Constitution, is given the authority to command the Army, make treaties, and to nominate, appoint, and receive ambassadors.

Now the key to this argument, Alexander Hamilton will point out, is this last right. The right to receive ambassadors. In the Pacificus-Helvidius Debates, Hamilton (Pacificus) says, on the topic of the importance of the receiving of ambassadors, "This right includes that of judging, in the case of a Revolution of Government in a foreign Country, whether the new rulers are competent organs of the National Will and ought to be recognised or not." In other words, in situations where the credibility of the authority of one government over a nation is questionable, this act of receiving essentially becomes an act of recognition.

An ambassador is, by the Merriam-Webster definition: "a diplomatic agent of the highest rank accredited to a foreign government or sovereign as the resident representative of his or her own government or sovereign"– the key phrase here is accredited to a foreign government. Meaning: to receive an ambassador is to receive an envoy, or an arm, of a foreign government.

James Madison, in that same set of documents: the Pacificus-Helvidius Debates, argues that "A new government cannot be implied by the right to refuse a public minister." Meaning, if the President or some other member of the executive branch refuses to receive an ambassador or public minister, he/she is not necessarily declaring the government of said minister to be illegitimate. Which makes sense. Sometimes, these kinds of rejections are based upon strife between governments or strife between a particular ambassador and a foreign government. Not every rejection is a declaration of illegitimacy, of loss of sovereignty for a particular regime, or of questionable governmental authority.

But Madison's argument seems to revolve around the idea that the two actions– receiving and rejecting, are somehow interchangeable: that because rejecting foreign emissaries does not imply a declaration of illegitimacy, receiving them cannot, conversely, imply legitimacy.

And this is where he is wrong. While there are many reasons the Executive branch would reject an ambassador (as previously listed), there is only one reason it would receive an ambassador: because the ambassador, by definition, is a representative of his/her government– and so to receive an ambassador is to recognize, intrinsically, the government he/she represents, and thereby, the sovereignty of said government over a particular nation. And so it is a mere phrase in Article II, Section 3 of the Constitution, "[The President] shall receive Ambassadors and other public Ministers." that gives the Executive branch the authority to recognize nations as legitimate or illegitimate. So in this case, Congress' mandate that the Secretary of State list, upon request, the birthplace of peoples born in Jerusalem as Israel, is a clear violation of the constitutional authority afforded to them. In doing so, Congress is essentially forcing the Executive branch to recognize a disputed territory (Jerusalem) as under the sovereign rule of a government (Israel). As was previously discussed, this is not an authority recognized as belonging to the Legislative branch by the Constitution. Not only can this power be attributed to the Executive branch through interpretation of Article II, Section 3, but also, it must be pointed out that it cannot be found in any of the four foreign policy authorities bestowed upon Congress in Article I. Therefore, it must be assumed that this power rests solely with the Executive branch, and is

But another important aspect of this argument is that of whether the distribution of the powers established within Articles I and II of the Constitution even extends the right of foreign policy initiatives to the Legislative branch. As Thomas Jefferson propounds in his Opinion on the Senate Respecting Diplomatic Appointments, the Constitution refers to a collaborative effort on the part of the Executive and Legislative branches in the process of treaty-creation and ambassador-appointment (Article II, Section 2, Clause 2). Jefferson goes on to point out, however, that the initiating actions are named exclusively to the Executive branch. Here, again, the wording of the document must be carefully examined in order to completely ascertain the correct interpretation.

The Constitution states that the President, "shall have Power [...] to make Treaties," so long as it is "by and with the Advice and Consent of the Senate," and "provided two thirds of the Senators present concur". Furthermore, "he shall nominate, and [...] shall appoint Ambassadors," again, "by and with the Advice and Consent of the Senate". This clause is a clear demonstration of the collaborative tone taken by the Constitution as a whole in relation to the subject of international affairs and diplomacy. But, as we can see, this collaboration is not a "free for all", so to speak. Both branches of the government are granted a particular role in these processes, which serve as a microcosm for their roles in foreign policy on the whole. Here, if we look closely, it is the Executive branch that has been empowered to take action and initiative. The President "make[s] treaties", he/she

"nominate[s]" and "appoint[s]" ambassadors. These verbs should not be discounted as mere parts of speech used to phrase an ambiguous idea. They are the basis upon which the Executive branch is given the duty of initiating foreign policy. It is the responsibility of the President and his/her cabinet members to take active steps in the formulation of international policies, according to this clause. In the text, the office of the Executive is the one that is taking initiatory action: making and nominating and appointing, while the Legislative branch is simply there to advise, to consult, on actions that have already been proposed.

And history has revealed this pattern to be one closely followed by both branches of government: Congress supported President Reagan during the Falkland Island crisis, just as it supported President Bush in his response to the Iraqi invasion of Kuwait, and just as the Marshall Plan was initially proposed by a member of the Executive branch (Secretary of State George Marshall) but supported and developed by Congress. History has shown that in most situations, it is the office of the President that proposes ideas that deal with international interaction, while Congress develops them from just that– ideas– into fully-fledged pieces of legislation.

The President serves as the head of state, and in many international conferences (The Yalta Conference, the UN Peacekeeping Summit, etc.) the heads of state are arms of negotiation, representatives of their countries, sent to make decisions and bargains and treaties with other nations. And thus, the President becomes the international representative of United States foreign policy. As it is he/she who must put this policy into action, whether it is in conferences or diplomatic visits or by commandeering the armed forces, it is the President and office of the President that are generally held accountable for the fate of our international relations– our response to crises, our peace negotiations, our global fiscal policies, and so it would make sense that they take the active role that is afforded to them by the Constitution and take steps to initiate international policy.

So how does this idea of power apply to this particular case? As we have previously mentioned, the law enacted by Congress in 2002 mandating that the Secretary of State, upon request, change the country of birth of persons born in Jerusalem to Israel, is unconstitutional in that it directly infringes upon the scope of Executive power, as mandated by the Constitution. But it is also an infringement of traditionally-held powers, of the system in which it is the Oval Office that initiates policy and Congress that executes it. This Congressional foreign policy initiative, one that threatens to upset a very delicate situation of ethnic and religious conflict, is disruptive to both global relations and to the already established system of foreign policy creation and development in the United States.

Conclusion:

This case is a case of power balance. Our nation's governmental structure is composed of precariously positioned checks and balances, which serve to regulate and restrain the government from the ability to reach a point of tyranny. Most of these checks and balances

are defined clearly in the Constitution, a document meant to both empower and limit the federal government. What the court must attempt to define, by use of precedent and already existing constitutional provision, is how and to what extent is the Executive branch given control of foreign policy. Our analysis suggests that close examination of Articles I and II of the Constitution will yield no straightforward answer to this question. The power, it seems, is dispersed between both the branches. Therefore, its important that we address exactly the type of foreign policy capability at issue here: recognition. The ability of the United States to recognize a foreign country, and wherein exactly that ability lies. Here, we find that through meticulous inspection of word usage, this power has been given to the Executive branch. That, coupled with the precedent of the Executive branch acting as the initiator in foreign policy situations, points both reason and logic against the Petitioner.
