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Del Valle High School

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Statement of the Argument

Ever since President Harry S. Truman recognized the state of Israel, the President of the United States, acting through his Secretary of State, has recognized no country as having control over the city of Jerusalem, even though the city resides in the country of Israel (Parts of the City 1948-1967, all of the city 1967-2014). As part of this policy, the passports of American citizens who are born in Jerusalem list their country of birth as Jerusalem, rather than Israel. This is so even though Jerusalem is not actually a country but a city.

Then Congress passed The Foreign Relations Authorization Act (2003). It is Section 214(d) of the Foreign Relations Authorization Act (2003) that requires the Secretary of State to record "Israel" as the place of birth on the passport of a United States citizen born in Jerusalem if the citizen or his guardian requests. The Secretary has not enforced this provision, believing that it impermissibly intrudes on the President's exclusive authority under the United States Constitution to decide whether and on what terms to recognize foreign nations.

The parents of Menachem Zivotofsky (a United States citizen born in Jerusalem), filed a lawsuit seeking a permanent injunction ordering the Secretary to issue a passport listing "Israel" as their son's place of birth. Ruling in favor of the Secretary, the Court of Appeals for the District of Columbia Circuit found that the President held exclusive power to determine whether to recognize a foreign nation. Section 214(d) was not the neutral regulation of the form and content of a passport (as Congress has the power to do under its immigration powers), but rather an attempted legislative articulation of foreign policy, enacted to alter United States foreign policy toward Jerusalem. As a result, Section 214(d) impermissibly intruded on the President's recognition power and was unconstitutional.

The question before the Court is whether a federal statute that directs the Secretary of State, on request, to record the birthplace of an American citizen born in Jerusalem as born in "Israel" on a Consular Report of Birth Abroad and on a United States passport is unconstitutional on the ground that the statute "impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him."

Argument

First: Dicta Is Not Law- "Illegality cannot attain legitimacy through practice."

The D.C. Circuit Court of Appeals in 2013 asserted for the first time in American history the existence of an exclusive presidential power of recognition—formal acknowledgement of the sovereignty of a foreign nation or government—broad enough to preclude Congress from interfering with the president's policy governing the terms of recognition. As a consequence, Zivotofsky is a case of "first instance" – the first in our nation's history in

which a court has been asked to resolve a clash between the president and Congress over the issue of recognition. The D.C. circuit also acknowledged that the Supreme Court has never "held" that the president enjoys either an exclusive recognition power or the sole authority to determine the policy to govern the act of recognition, but said that, as an inferior court, it is required to treat "dicta" as authoritative.

According to Black's Law Online Dictionary.com: Dicta is the part of a judicial opinion which is merely a judge's editorializing and does not directly address the specifics of the case at bar; extraneous material which is merely informative or explanatory. Dicta are judicial opinions expressed by the judges on points that do not necessarily arise in the case.
The circuit's court's indulgence of dicta—judicial commentary unrelated to the issue at hand—has transformed a narrow, clerk-like, ministerial presidential duty to receive ambassadors and foreign ministers into a towering structure of discretionary power to formulate and conduct American foreign policy. Actually if left to stand this ruling would rewrite the U.S. Constitution. However, this change would without benefit of any proper legal measures of change as outlined in the U.S. Constitution. It would be just Dicta piled upon dicta. This is judicial error running riot, and the Supreme Court should correct it. Justice Felix Frankfurter was right when he wrote, "Illegality cannot attain legitimacy through practice."
Through use of this practice of using dicta the court first determined that the Executive's recognition power is, in fact, exclusive. Although "[n]either the text of the Constitution nor originalist evidence provides much help," the Court erroneously concluded a decision based upon not upon longstanding practice and Supreme Court precedent to make it clear that the President's recognition power is exclusive. Here, the court noted that the power has been treated as such by the Executive throughout our nation's history. For example, the court said, "President Washington's cabinet unanimously concluded that Washington need not consult with the Congress before receiving the minister from France's post-revolutionary government, notwithstanding his receiving the minister recognized the new government by implication." The only problem here is that this was part of the President's powers under the Constitution- to receive ministers not vice versa.
This same sense loose of wording in Constitutional law was used by Justice Hugo Black in the Evenson case 1947. Here, Justice Black applied the intent of the founding fathers by utilizing a portion of a letter written in a 1802 reply by him to the Danburry's Ministers Association. Here, Justice Black took a letter to a group of people and tried to show that this was the same as law. Jefferson was President but private correspondence to private individuals is not law. This is very similar to dicta. Dicta is nothing more than notes written by a judge or clerk on a law case. It is not the ruling and it is not part of the opinion. However, Justice Hugo Black applied his interpretation of what Jefferson said in

his letter as information to show the intent or need for applying the 14th amendment to the original intent of the founding fathers. By using private letters, the Court, set a precedent in Everson to apply writings outside of the law to the case. Now in Zivotofsky, the Court of Circuit Appeals in Washington D.C. is doing one better they are taking notes or comments and making them equal to legal opinions. What is next? Are going to allow thoughts, intentions, or simple act trying to become legal proof?

Second: Congress Has Long Legislated Over Passports, Foreign Commerce, and Naturalization Issues. This Longstanding, Unchallenged Legislative Direction of the Executive Affirms Congress' Plenary Authority to Regulate Issuance of Passports

The Constitution grants Congress the power "To regulate Commerce with foreign Nations" and "To establish an uniform Rule of Naturalization," U.S. Const. art. I, § 8, cls. 3, 4; *Demore v. Kim*, 538 U.S. 510, 521 (2003) (Congress has "broad power over naturalization and mmigration") (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)). Pursuant to these powers, Congress has enacted legislation governing the issuance of passports from the earliest days under the Constitution. In 1803, Congress made it a crime for a consul or commercial agent of the United States knowingly to grant a passport to an alien. Act of Feb. 28, 1803.

During the War of 1812, Congress prohibited U.S. citizens from crossing into any territory "belonging to the enemy" without "a passport first obtained from the Secretary of State" or other specified federal or state official. Act of Feb. 4, 1815, ch. 31, § 10, 3 Stat.195, 199. Cross apply the fact that Current Secretary State, Mr. John Kerry, obtains his power over passports not from the Executive Branch or something giving to from the President but from the Congressional Act of Feb. 4, 1815.

Congress broadly regulated passport issuance in 1856. Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. 52, 60. Congress authorized the Secretary of State "to grant and issue passports" and to authorize the issuance of passports by U.S. diplomatic or consular officers in foreign countries, "under such rules as the President shall designate and prescribe for and on behalf of the United States."

In 1917, Congress mandated that persons seeking passports submit a written application under oath and made it a crime knowingly to make a false statement in a passport application, to use a passport issued to another person, to violate the restrictions in a passport, or to forge, counterfeit, or alter passports. Act of June 15, 1917, Pub. L. No. 65-24, Title IX, §§ 1-4, 40 Stat. 227.

Congress overhauled the passport laws in 1926. Act of July 3, 1926, Pub. L. No. 69-493, 44 Stat. 887 ["Passport Act of 1926"]. Using essentially identical language as in the 1856 law, the Passport Act of 1926 authorized the Secretary of State to "grant and issue passports" and to cause such passports to be issued in foreign countries by diplomatic and consular

representatives, "under such rules as the President shall designate and prescribe for and on behalf of the United States."

Although Congress has modified the provisions of the Passport Act of 1926 over time, that statute remains the basis for the Executive's authority to issue passports. Indeed, section 1 of the Act—authorizing the Secretary to grant passports— has been amended only twice. In 1978, Congress prohibited the Executive from issuing passports that are "restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travelers." Foreign Relations Authorization Act, FY 1979, Pub. L. No. 95-426, § 124, 92 Stat. 963, 971 (1978). And twenty years ago, Congress modified the universe of officials who could issue passports. Accordingly, from early in the Nation's history, Congress has exercised its power to regulate the manner in which the Executive issues passports, including restricting which officials can grant pass-ports, requiring that passport applications be written and submitted under oath, establishing the period passports remain valid, setting the passport fee, and criminalizing the creation or use of fraudulent passports. This longstanding, unchallenged legislative direction of the Executive affirms Congress' plenary authority to regulate issuance of passports. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) ("'[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President.") (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

Third: Section 214(d) Is Not an Act of Recognition of Foreign Governments or Their Sovereign Territory.

This Court has "squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches." *Nixon v. Adm'r of General Services*, 433 U.S. 425, 443 (1977). In determining whether an Act of Congress "disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the

governments. In enacting section 214(d), Congress has neither exercised the power of recognition, nor "prevent[ed] the Executive Branch from accomplishing its constitutionally assigned functions" of recognition, *Nixon*, 433 U.S. at 443, regarding the official position of the United States on sovereignty over Jerusalem.

The Executive and Congress share constitutional responsibility over foreign affairs. Congress exercises legislative authority in numerous areas significantly affecting foreign affairs, including appropriating funds, regulating foreign commerce, imposing customs duties and tariffs, declaring war, and raising and supporting the Nation's military forces. In

addition, the Senate ratifies treaties and provides advice and consent to the appointment of ambassadors and other public ministers and consuls. Obviously, legislation and Senate action in these areas may have profound "foreign policy consequences."

It is equally clear that the specter of adverse consequences does not render such legislative action unconstitutional. By striking down section 214(d) because the Executive believes the provision has harmful foreign policy consequences, the court of appeals improperly constricted Congress' legitimate exercise of legislative authority.

The court of appeals also abdicated judicial oversight of Executive action. Having linked exercise of the recognition power to effects on foreign policy, the court accepted as "conclusive" the Executive's "view" that section 214(d) would "cause adverse foreign policy consequences," because the Judiciary is "not equipped to second-guess the Executive regarding the foreign policy consequences of section 214(d)."

The court of appeals held that section 214(d), "by attempting to alter the State Department's treatment of passport applicants born in Jerusalem, directly contradicts a carefully considered exercise of the Executive branch's recognition power." *Zivotofsky*, 725 F.3d at 217. The court erred in ruling that providing U.S. citizens with an option for identifying their place of birth in passports and consular birth reports constitutes an act of recognition of foreign governments by the United States. The nature of the modern passport, the purpose of "place of birth" information in the passport, and the State Department's policies providing U.S. Citizens born abroad with options in identifying their birthplace in passports demonstrate that birthplace information serves solely to identify the passport bearer and not to recognize sovereign governments or their territory.

Traditionally, a passport had been considered "a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer." *Haig*, 453 U.S. At 292 As this Court explained in 1835: [The passport] is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognised, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact. *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 698 (1835).

As more American citizens began to travel abroad and use of passports became more widespread In responding to interrogatories in this case, the Department confirmed that identification is the sole purpose served by the "place of birth" specification: The "place of birth" specification assists in identifying the individual, distinguishing that individual from other persons with similar names and/or dates of birth, and identifying fraudulent claimants attempting to use another person's identity. The information also facilitates retrieval of passport records to assist the Department in determining citizenship or notifying next of kin or other person designated by the individual to be notified in case of

an emergency on the U.S. passport application. The date and place of birth fields are also used in the Department of State American Citizens Services (ACS Plus) electronic case tracking system.7 Thus, the Department itself recognizes that the "place of birth" entry in a passport serves to aid in identifying the passport bearer; it is not an instrument for recognizing foreign sovereignty.

Conclusion

We offered three points of error with D.C. Circuit Court decision. Each error is based upon a different logical fallacy and creates a tremendous problem for our jurisprudence system.

First, the D.C. Circuit Court of Appeals created a cause and effect logical fallacy when they begin to base law on dicta. Dicta by definition is part of the process of coming to a decision. They can be thoughts or ideas but they are not the whole idea, the whole thought, or for that matter the whole opinion. So by adopting the concept that part is greater than the whole, you do away the entire opinion which have become laws and replace them with single thoughts. This confuses an already confused situation by mixing up the cause and effect. What happens with contradictory Dicta? What happens when going through a thought process a person changes their mind? Case law stands because it based upon the written opinion of the majority of judges who heard the case, it can not stand on the Dicta in the margins of the roughed up opinions. Unless we want to marginalize the rule law and make case law we simply can not be swayed by the dictates of the Dicta but rather go with the written opinions of the majority.

Second, the State Department obtained their power to issue passports from enabling Congressional actions. If the State Department obtained their power from Congress then it would be a real non sequitor (Black's Law Dictionary Online. Com) a conclusion or statement that does not logically follow from the previous argument or statement. You can not blame the organization that granted you the authority to do something and then turn around and blame that authority for not having the right to give it to you. If that was the case, the respondent took out their own case- they took out their own right to issue passports.

Third, Section 214(d) is not an act of recognition of foreign governments or their sovereign territory. This argument by the respondent is a red hearing logical fallacy. If one understands this argument correctly, the passport itself is an official government document that is issued to an individual. It documents the identity of the person they issue it to not the identity of the government or its foreign policy. As such, to identify a place of birth was done to identify the person, not to identify a foreign policy. To somehow state or argue that a personal identification of a place of birth is a recognition of foreign policy is an argument

that not even related to concept that Section 214 (d) as it was enacted into law.

For these reasons please overturn the D.C. Circuit Court's ruling on this case and find that Section 214(d) does not intrude on the President's recognition power and it is constitutional.
