Respondent's Brief Zivotofsky v Kerry: Del Valle High School

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Citied Authorities

Cases

American Insurance Ass'n v. Garamendi, 539 U.S. 396 (2003)
Banco Nacional de Cuba, v. Sabbatino, 376 U.S. 398 (1964)
Bond v. United States, 131 S. Ct. 2355 (2011
Bowsher v. Synar, 478 U.S. 714 (1986)
Clinton v. New York City, 521 U.S. 417 (1998)
INS v. Chadha, 462 U.S. 919 (1983)
Kent v. Dulles, 357 U.S. 116 (1958)
Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804)
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)
Medellín v. Texas, 552 U.S. 491 (2008)
Mistretta v. United States, 488 U.S. 361 (1989)
Morrison v. Olson, 487 U.S. 654 (1988)
Nixon v. Administrator of General Services, 433 U.S. 425 (1977)
Noel Canning v. NLRB, 134 S. Ct. 2550 (2014)
Public Citizen v. Department of Justice, 491 U.S. 440 (1989)
Raines v. Byrd, 521 U.S. 811 (1997)
Train v. Campaign Clean Water Inc., 420 U.S. 136 (1975)
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)
United States v. Nixon, 418 U.S. 683 (1974)
Washington Metropolitan Airports Authority v. Citizens Against Aircraft Noise, 501 U.S. 252 (1991)
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)

Statement Of Facts

This case is clear cut example of Constitutional Law. Whether a federal statute directing the Secretary of State to list the birthplace of American citizens born in Jerusalem as Israel on the Consular Report of Birth Abroad and on the U.S. passport is unconstitutional because the statute "impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him."

Section 214(d) of the Foreign Relations Authorization Act, requires the Secretary of State to record "Israel" as the place of birth on the passport of a U.S. citizen born in Jerusalem if the citizen or his guardian so requests. Plaintiff's parents sought to list his birthplace as "Jerusalem, Israel", and sued when "Jerusalem" was listed as the place of birth. In prior history, the Secretary of State has not enforced the provision, since it intrudes on the President's exclusive authority under the United States Constitution to decide whether and on what terms to recognize foreign nations. Due to the nature and sensitivity of the issue, U.S. Presidents have consistently followed a strict policy of not getting involved in Jerusalem status issues because they do not want to engage in official actions that would recognize, or may result in, Jerusalem as the capital city of Israel, or even as a sovereign territory.

The lower district court determined that a separation of powers dispute exists when both branches are involved in a struggle, and that section 214(d) impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him under the Constitution. Petitioner petitioned for certiorari to the Supreme Court, alleging that whether the President has the power to determine recognition of birthplace is an issue of national importance. In addition, Petitioner argues that the historical survey used by the court of appeals is incorrect and conflicts with other surveys and assessments. Thus, the Supreme Court granted certiorari to determine whether the Secretary of State can list American citizens' birthplace as Israel, or if it impermissibly infringes on the President's exercise power.

Argument

ARGUMENT I. The Court of Appeals Correctly Ascertained Section 214 (D) Infringed Upon The Executive Branch's Power

A. The Executive Branch has the Exclusive Power to Recognize Foreign Sovereigns.

1. Constitutional Text

Article II of the United States Constitution grants the President foreign affairs power, including the power to recognize foreign governments. Article II §2 grants the President the power of Commander in Chief of the United States Army and Navy, the power to make treaties, and the power to appoint ambassadors. Further, Article II, §3 of the Constitution provides that the President "shall receive Ambassadors and other public Ministers." These powers make the President the nation's principal organ of foreign affairs. As Alexander Hamilton explained, "[t]he Legislative Department is not the organ of intercourse between the United States and foreign Nations. It is charged with neither with making nor interpreting Treaties. It is therefore not naturally that Organ of the Government which is to pronounce the existing condition of the Nation, with regard to foreign Powers." Rather, "[t]he right of the Executive to receive ambassadors and other public Ministers. . . . 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 recognized or not." The power to recognize foreign governments is a function of the Executive's duty to preserve the peace by maintaining a state of neutrality until war is declared and part of the duty to receive ambassadors, as receipt of ambassador indicates recognition of ambassador's country.

2. U.S. Supreme Court Case Decisions

This Court has consistently affirmed the Executive's exclusive recognition power as the sole organ of foreign policy. As former Chief Justice John Marshall stated on March 7, 1800 before the U.S. House of Representatives, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." The President is the sole organ because, "[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates."

This Court has also consistently affirmed the President's exclusive role to formally recognize foreign governments. This Court stated in BancoNacional de Cuba v. Sabbatino, that "[p]olitical recognition is exclusively a function of the Executive." But not only is it the Executive's role to determine recognition, but also to determine the 'underlying policy' governing the question of recognition. It is better for the Executive to determine the underlying policy of recognition because, "[the President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war." Given that Israel and Palestine are frequently in a 'time of war' and have been in an ongoing conflict since 1948, the President is in a better position than Congress to determine the appropriate policy underlying recognition of Jerusalem, especially since the status of Jerusalem is one of the chief disputes of the Israeli-Palestinian conflict and the corresponding negotiations for peace.

3. The Respondent's Policy Reflects Real Policy That Is In Effect Today

Centuries-long Executive branch practice of recognition power and congressional acquiescence to the Executive's practice, confirm that the Executive possesses the exclusive recognition power. As Congress conceded in its Brief in Support of the Petitioner, the "President properly takes the lead in performing the ceremonial act of recognition, in his role as the instrument of foreign policy," yet "Congress plays an integral role in shaping that policy." Indeed, the decision of the Court of Appeals to recognize the President's exclusive recognition power does not demote Congress from

the President's counterweight in foreign affairs to his minion as Congress claims. The Constitution equips Congress with a variety of foreign affairs powers which it can properly utilize without "purporting to direct the Executive to alter formal recognition policy" as it has in this case. Congress' 'power of the purse', taxing and spending, and appropriations powers provide Congress with the power to balance the President's foreign affairs power, without infringing on the President's exclusive recognition power. As James Madison articulated, "This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."

Separation of powers requires a balance between Congress' power of the purse and the President's foreign affairs power, neither of which are plenary. The Petitioners argue that Congress in the past has passed legislation that deals with recognition. However, the issue is not whether Congress can pass legislation that touches on recognition, but whether Congress can officially usurp the President's recognition power through legislation such as Section 214(d). "The acknowledgement of the independence of a new Power is an exercise of Executive authority; consequently, for Congress to direct the Executive how he shall exercise this power, is an act of usurpation." Section 214(d) directs the Executive how to exercise his power and recognize Jerusalem within the territory of Israel. Congress can pass legislation touching on recognition so long as it does not act to usurp the Executive's policy on recognition.28 For example, in 1800, Congress passed legislation touching on recognition by declaring that St. Domingo (Haiti) was still a colony of France. However this was the same as Jefferson's Executive determination, so the legislation did not infringe on the Executive recognition power.

Additionally, in 1837, Congress passed legislation appropriating funds for a salary for a diplomatic agent to Texas "whenever the President of the United States may receive satisfactory evidence that Texas is an independent power, and shall deem it expedient to appoint such a minister." Thus, this appropriations legislation left authority for recognizing Texas as an independent power with the Executive. In 1979, the United States formally recognized the Government of the People's Republic of China as the sole legal government of China. Following the Executive's decision, Congress utilized its power to pass the Taiwan Relations Act of 1979 ("TRA"). The TRA provided many benefits to Taiwan, but the TRA still left open the official decision of formal recognition of the Government of China to the Executive. Unlike the legislation in this Case, the TRA did not intrude on the President's exclusive recognition power. The Executive's "strategic ambiguity" in the TRA left room for Congress to pass legislation without infringing on the Executive's power to conduct foreign relations. Petitioner's argument that President Clinton's signing of 1994 legislation that permitted U.S. citizen's born in Taiwan to list "Taiwan" as their place of birth on passports sets precedent for Section 214(d), however this analysis is flawed.36 When Congress passed a passport statute affecting Taiwan in 1994,the State Department complied "only after determining that doing so was consistent with United States policy that Taiwan is a part of China."

In contrast, President George W. Bush stated that if Section 214 imposed a mandate, it would "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."

Section 214(d) is inconsistent with U.S. policy and thus infringes on the executive's exclusive power. Similarly, the 1898 joint resolution regarding the status of Cuba did not infringe on the Executive's recognition power, as the resolution did not recognize Cuba as a sovereign nation. Nor did the joint resolution recognize the insurgent government as the legitimate government of Cuba. The resolution merely provided that the United States did not recognize Spain's sovereignty over Cuba as a colony and the "people" of Cuba were independent. Further,

President McKinley opposed the inclusion of the "recognition of Cuba" language and only signed the joint legislation into law after this language was removed. Once again the 1898 joint resolution did not infringe on the Executive's exclusive recognition with U.S. foreign policy. Whereas, Section 214(d) provides recognition even if just symbolic in nature, and is inconsistent with U.S. foreign policy.

Section 214(d) impermissibly infringes on the Executive's power to conduct foreign relations. The Constitution "contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." While Congress has significant power over influencing foreign affairs and shaping foreign policy, Congress "must often accord to the President a degree of discretion and freedom from statutory restriction that would not be admissible were domestic affairs alone involved."

Further, while Congress has the power to enact passport legislation, this legislation presents a separation of powers problem if it infringes on Executive authority to conduct foreign affairs.
By enacting Section 214(d) of the Foreign Relations Authorization Act, Congress has impermissibly infringed on the President's power to conduct foreign relations. Congress downplays the significance of the statute by arguing that it "merely provides a U.S. citizen with the opportunity to fill in a particular field in that citizen's travel documents in a particular manner."
President Obama administration's brief filed in February correctly asserts that the U.S. passport is a political statement on behalf of the U.S. Section 214(d) will have "grave foreign-relations and national security consequences." Indeed, this Court in Urtetiqui v. D'Arcy and Haig v. Agee noted that a passport "is addressed to foreign powers" and "is to be considered in the character of a political document." Former President George W. Bush was against this infringement on the Executive's power as well, as he warned of the potentially problematic directive from Congress in Section 214(d). President Bush stated that if Section 214 imposed a mandate, it would

Argument Two: The Petitioner Has No Real Legal Standing To Bring The Cause Because They Have To Show That He Has Suffered A Concrete Injury.

Article III of the Constitution "confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.' § 2. One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so." Hollingsworth v. Perry, 570 U.S. __, 133 S.Ct. 2652, 2661 (2013). This Court has identified "the irreducible constitutional minimum of standing," comprising three elements, of which only one comes into play here: "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is . . . concrete and particularized." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992). Accord Susan B. Anthony List. v. Driehaus, 134 S.Ct.2334, 2341-42 (2014); Hollingsworth, 570 U.S. __, 133 S.Ct. at 2661.
This harm must be "tangible," Hollingsworth, 133 S.Ct. at 2661, and it must be "distinct and palpable," Gollust v. Mendel, 501 U.S. 115, 126 (1991) (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)). Of course it must also be an "injury" to begin with. Most fundamentally, the requisite injury must involve "an invasion of a legally protected interest." Lujan, 504 U.S. at 560. This notion is so fundamental that its proper application is generally treated as self-evident, not as calling for discussion. See, the opinion in Adarand Constructors v. Pena, 515 U.S. 200, 212 (1995) ("Adarand's claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest.")
The problem here is that the harm here is not able to be documented. The party invoking federal jurisdiction bears the burden of establishing that he has suffered an "injury in fact." Lujan, 504 U.S. at 560. Petitioner is that party and bears that burden. If he cannot prove it, he has no standing and cannot pursue this case. Just by changing the case to Civil Rights issue- you cannot deny the fact that original case would not have been brought up in the first place. That means the appeal would be not nonexistent because the case would have been already dismissed in the first place.

Argument Three the Petitioner Cannot Show That He Has Suffered The Requisite Injury To Continue The Case

Not complying with Section 214(d)'s directive, to record "Israel" as petitioner's birthplace on his passport (and certain other official documents), the Secretary wrote "Jerusalem" instead. That is the sole basis of petitioner's claim for injunctive and declaratory relief: he (by his guardian) filed this action to have "Jerusalem" replaced by "Israel." He alleges no other injury, such as economic or physical harm, or even the psychological harm that could conceivably flow from the wounding of his feelings as a Jerusalem-born U.S. citizen who, one imagines, might like to have an official U.S. document stating that he was born in Israel.
The Court of Appeals ruled that this statutory violation sufficed to establish petitioner's standing: "Although it is natural to think of an injury in terms of some economic, physical, or psychological damage, a concrete and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by statute." Zivotofsky, 444 F.3d at 618. Yet in this case—unlike, say, environmental-law cases, or cases under the Freedom of Information Act ("FOIA"), cited by the Court of Appeals—there is no express statutory right to sue. And the absence of injury other than the statutory violation itself is, as it were, palpable
In other words, petitioner has not suffered a cognizable "injury in fact": no concrete injury, tangible and palpable—and also no "invasion of a legally protected interest." Some reasons why petitioner's "injury" is not cognizable—why he lacks standing—are set out, informally and concisely, in a recent blog post by a well-known legal scholar. See E. Kontorovich, Why the Jerusalem passport case

should be dismissed for lack of standing, WASHINGTON POST , Apr. 25, 2014.

Argument Four: Petitioner's Passport Is Not "His" It Belongs To The Government So He Can Get A Harm From A Policy Change

"To start with, the passport is not 'his.' Rather,as it says on page five of my passport, it is 'U.S Government Property . . . It must be surrendered upon demand made by an authorized representative of the United States.'" 22 C.F.R.
§ 51.7(a). "One generally does not have any legally cognizable interest in other people's property that is not causing a nuisance, even if one is allowed to carry it around." The fact that petitioner has no property interest in his passport does not mean he has no rights with respect to it, of course. Haig v. Agee, 453 U.S.280, 307 (1981) (cancellation of passport implicates specific liberty interest, the right to travel internationally). But petitioner has not been disturbed in the use of his passport: he wants a federal court to order the Secretary to revise the passport to conform with the statutory directive. Especially since the passport is not even "his," it is hard to portray him as resisting "an invasion of a legally protected interest."

Argument Five Section 214(d) Confers No "Right" and No Right of Action
A. A Statue Is Not A Right

"Of course, there is a statute involved, but it does not create a 'right,' let alone a cause of action, to have Israel listed on one's passport. Rather, it says that the State Department should only list 'Israel' as a birthplace if the passport-holder so requests. That is, if anything, more about the rights of nonrequesters" who would not want "Israel" on their passports, "or about the bureaucratic process for making passports. Oddly, the Court of Appeals, in reversing the standing dismissal, analogized the injury to denials of Freedom of Information Act requests. FOIA, however, specifically creates a detailed cause of action, which the passport measure does not." Zivotofsky, 444 F.3d at 618-619
It is important to distinguish between two related points. Section 214(d) does not confer a "right" on a Jerusalem-born U.S. citizen to have "Israel" shown on his passport. And there is no implied private right of action under Section 214(d) to secure this non-existent right by suing in federal court. "There is no 'injury' to Zivotofsky; he has not been deprived of any legal entitlement. Indeed, Congress's law, given its context, was not about making American citizens [born] in Jerusalem feel good, even if such a sentiment could give rise to an Art. III injury, which I doubt." Research discloses no case in which this Court has held that sentiments or wounded feelings related to a statutory violation amount to cognizable injury. Cf. Sierra Club v. Morton, 405 U.S. 727, 734-735 (1972) (holding that plaintiff lacked standing, but acknowledging that "change in the aesthetics and ecology" of a national park "may amount to an 'injury in fact'" and that "particular environmental interests" may be "deserving of legal protection through the judicial process").
The immediate objective "context" of Section 214(d) of the Act includes not only the familiar history of the legislative effort but the three preceding subsections of Section 214: 214(a) through 214(c). All are related to the goal of U.S. treatment or recognition of Jerusalem as "capital" of Israel. And Section 214(d) moves toward that goal too, by treating Jerusalem as part of Israel's territory, just as the State of Israel does. "Imagine a government form that asked those filling it out to indicate if they were white, black or Hispanic. Subsequently, in compiling this information, the government chooses to lump Hispanics in with whites. I do not think the mere fact that . . . Hispanics were involved in filling out the forms would give them standing to challenge what the government does with the information.
The passport issue is also one about how the government classifies information provided by individuals."At bottom, petitioner "is using the contents of his passport to litigate an ideological injury": "Such policies [as "the Executive's" policy "of not saying Jerusalem is in Israel"] affect not just the plaintiff, but the entire nation. Indeed, it affects him in ways
not differentiable from [those of] the U.S. as [a] whole, whose passport it is." But injuries that are "not differentiable" from those of the nation, or of the public at large, clearly cannot satisfy the injury-in fact requirement. As the Court held in Lujan, "the public interest in the proper administration of the laws . . . cannot be converted into an individual right by a statute that denominates it as such." 504 U.S. at "individual right" is "denominate[d]" by the statute everything at all.
Certain of petitioner's arguments, in stating their respective "interests," appear to suggest that petitioner suffered an "injury"; but their own words cut against this suggestion: their evident difficulty in articulating a relevant interest tends to show that the supposed injury has no concrete

content (it's vacuous), or is self-inflicted (it's invented), or really has nothing to do with the statute. A few of the assertions will make the point: American Jewish Committee ("AJC"): "[T]he statute upholds the dignity of United States citizens born in Jerusalem who wish to identify Israel as their nation of birth" (Brief of AJC at 1). These citizens don't need this statute (or its enforcement) to do so: they are free to "identify Israel as their nation of birth" without government assistance.

Association of Proud American Citizens Born in Jerusalem, Israel ("an ad hoc, web-based organization"): They describe themselves as "Jerusalem born American citizens who wish to self-identify as U.S. citizens born in Israel" (Brief of ADL, et al. at 2).

International Association of Jewish Lawyers and Jurists ("IAJL"): The statute "does nothing more than allow U.S. citizens born in Jerusalem to express their own view on the issue by choosing how to describe their place of birth in their passport" (Brief of IAJL at 2). It's not "their" passport—

B. The Sheer Statutory Violation Does Not Constitute "Injury in Fact"

Logically, petitioner's last-ditch proposition is this: the injury-in-fact requirement is satisfied by the sheer statutory violation, without more. But even a cursory inspection of the leading cases does not support such a "naked-violation" rule, so petitioner should be held to lack standing on this score too. At best (for petitioner), it is an open question whether the naked-violation rule is the current rule of law: it is certainly a question that the Court recently declined to decide in another case, and could now take up here.

In holding that petitioner had standing (Zivotofsky, 444 F.3d at 617), the Court of Appeals relied primarily on two cases from the 1970s for the supposed naked-violation rule, which it seemed to embrace: (1) Linda R. S. v. Richard D., 410 U.S. 614,

617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.)" Warth v. Seldin, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.").

In both of these cases, however, the pronouncement on standing quoted by the Court of Appeals was unquestionably dictum: in neither case was it necessary to the holding, since the Supreme Court held in both that the plaintiff before it did not have standing. See Linda R.S., 410 U.S. at 617-618; Warth, 422 U.S. at 514. Even this Court's obiter dicta are not properly taken as controlling precedents—and least of all in this Court.

The Court took a closer look at the supposed naked-violation rule in Lujan. Denying standing once again (504 U.S. at 578), the Court left undisturbed the broad dictum in Linda R.S., declaring: "Nothing in [the ruling] contradicts the principle [stated in Linda R.S.] that 'the . . . injury required by Art. III may exist solely by virtue of statutes creating legal

rights, the invasion of which creates standing.'" To show that there was no contradiction with this dictum ("principle"), the Court considered the precedents relied on in Linda R.S. and distinguished them (ibid.): "Both of the cases used by Linda R. S. as an illustration of that principle involved Congress' elevating to the status of legally cognizable injuries

concrete, de facto injuries that were previously inadequate in law (namely, injury to an individual's personal interest in living in a racially integrated community, Trafficante v. Metropolitan Life. Ins.Co., 409 U.S. 205, 208-212 (1972), and injury to a company's interest in marketing its product free from competition, see Hardin v. Kentucky Utilities Co.,

390 U.S. 1, 6 (1968)).

" And it is one thing to broaden categories of injury by statute, for standing purposes, another to "'abandon[] the requirement that the party seeking review must himself have suffered an injury.'" 504 U.S. at 578 (quoting Sierra Club v. Morton, 405 U.S. 727, 738 (1972)).

In short, the sheer statutory violation is not sufficient: there is always something more required for "injury in fact," perhaps a wrong "previously inadequate in law." Petitioner clearly suffered no such wrong. He has nothing more than a statutory violation to allege, and so he suffered no injury cognizable in federal court. At best, from petitioner's viewpoint, it is an arguably open question whether a statutory violation without more suffices in general for "injury in fact."

This was essentially the question on which the Court granted certiorari in First American Financial Corp v Edwards, 131 S.Ct. 3022 (2011). There the specific question was whether a plaintiff has standing to challenge a violation of the Real Estate Settlement Procedures Act ("RESPA"), absent an allegation that the alleged violation resulted in an overcharge—i.e.,

with nothing more than the sheer violation of RESPA. After briefing and oral argument, however, the Court dismissed the writ as "improvidently granted." First American Financial Corp. v.

Edwards, 132 S.Ct. 2536 (2012).The Court could revisit this issue in the present case.

CONCLUSION

We pray for the foregoing five reasons, the case should be dismissed for lack of standing. Accordingly, the judgment below should be vacated and the case remanded with instructions to enter an order of dismissal.
