Brief for Respondent – Jacob Shaw and Danielle Thompson

Del Valle/ Respondent Brief

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Table of Cited Authorities

Zivotofsky v. Kerry
Pub. Papers of the Presidents of the United States: George W. Bush 1697, 1698 (Sept. 30, 2002)
U.S. Constitution Article II, Section 3
RESTATEMENT (SECOND) OF FOREIGN RELATIONS §94(1)
Foreign Policy Association
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U.S. Constitution Article 1, Section 8, Clause 11
CQ Press
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Statement of Argument

The issue in this case 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." While it is the contention of the Respondent that allowing Congress to hold the recognition power would be unconstitutional, this standard has been established in the post ratification practices in regards to the constitution as opposed to the pre ratification practices. Essentially, the federal statute in question, Foreign Relations Authorization Act, Fiscal Year 2003 (Act), Pub. L. No. 107-228, 116 Stat. 1350 § 214(a), 116 Stat. 1365, contradicts and circumvents the long standing history in which the executive power has unilaterally owned the recognition power. In fact, said federal statute renounces a power solely exercised since the inception of the executive power in that of first president George Washington. Therefore, the president's recognition power is not subject to congressional control, lest the foundation of this country in its foreign affairs be wholly and unlawfully negated.

Argument

In asserting that the executive power has sole claim to the recognition power, free from congressional interference, there are two main reasons as to why:

I. Due to the historic background of the recognition power and its relation with the executive power, stripping away said power from the President and giving it to Congress would not only be unprecedented, but incongruent with the established principles of this nation.

When the Foreign Relations Authorization Act was to be enacted, then President George W. Bush said that an approval of the law 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." He then signed but pledged not to follow the law, believing that Congress had no constitutional historical authority to make him withdraw and thus forfeit his innate recognition power, being that he was the head of the executive branch. The Obama Administration has since then followed suit by also pledging not to follow the law. The disagreement with the law professed in both administrations is most obviously warranted, when the historical context of the recognition power is considered.
Being defined as "the act by which a state commits itself to treat an entity as a state or to treat a regime as the government of a state," recognition is just as critical as it is controversial to the wellbeing of foreign affairs for the U.S. with regards to the president, recognition is a key component of his authority. According to the Foreign Policy Association, "Under the Constitution, the President serves as head of state and head of government. In most other governments (Britain's and Germany's, for example), the two functions are separate. As head of state, the President is, in effect, the personification of the U.S.: its visible image, its official voice and its primary representative to the outside world. As head of government, he formulates foreign policy, supervises its implementation and attempts to obtain the resources to support it. He also organizes and directs the departments and agencies that play a part in the foreign policy process. Along with the Vice President, he is the only government official elected nationally. This places him in a unique position to identify, express and pursue the 'national interests' of the U.S." Undoubtedly, the president is the image of the U.S. and therefore is understood to be the true authority to recognize foreign governments and countries. Not only has this continuously been the case in this nation's history because of the will of the Founding Fathers, but also because of the logical principle involved as well. For example, if Congress ever chose to recognize a particular country as opposed to allowing the President to do so himself at any point in history, then all

diplomatic relations could cease to stay positive. If the President chose not to recognize said country, then effectively the face of the U.S. would be unidentifying said country and the recognition would not be in true standing. Further, foreign countries have always seeked out the betterment of relationships, approval of actions, and further diplomatic agendas with the President and not Congress. Certainly for recognition of their country, foreign countries would seek out the approval by the President as well, just as they always have and will continue to do.

The historic constitutional principle of this standard is written in Article II, Section 3, of the Constitution which states that, "[The President] shall receive Ambassadors and other public Ministers[.]" The underlying message in this rhetoric of the Constitution, decidedly, is that in other words, the President has the power, "in effect, to recognize foreign governments." Logically, this is because the president would not be able to receive "Ambassadors" from foreign countries without first recognizing that country. This same logic is applied in accordance with the principle of checks and balances between Congress and the President in the context of war. Specifically, under Article 1, Section 8, Clause 11 of the Constitution, "The Congress shall have the power to declare War [on a foreign country]." However, Congress utilizes their constitutional power for declaration of war upon foreign countries. In effect, this means that Congress can only declare war on established foreign countries, which the President has the power of recognizing. This creates the power balance from which the checks and balances system allows for. Such a balance has been upheld in all five wars that Congress has ever declared; the last one being World War 2. Unfortunately, while the Constitution is written in such a way to prevent tyranny from ever occurring, it is not written in such a way to prevent conflict between the branches of government. Specifically, the Constitution's written language in regards to foreign affairs is considered an "invitation to struggle" between the executive and legislative branches of government. Nonetheless, this conflict between the President and Congress is eliminated when considering the fact that "presidents [all throughout the history of the U.S.] have successfully claimed exclusive authority to decide which foreign governments will be recognized by the United States." This undisputed dominance by the executive branch is henceforth historically justified and should therefore not be an issue in the case at bar. In summation, this case comes down to upholding the standard that the government has had in place since the inception of this country as clearly shown from its constitutional historical context.

II. If the Petitioner's argument in favor of the Foreign Relations Authorization Act were to be upheld, it would warrant a precedent that is contrary to the welfare of the system of checks and balances between Congress and the President.

Following the recent Supreme Court decision in NLRB v. Noel Canning, the standard of

checks and balances within our system of government was reinforced as to not give an unfair amount of power to the President over Congress. In that case, the burden of proof was on the executive branch to prove that they had a compelling interest to exert their particular power over Congress in the context of recess appointments, another constitutionally ordained power. Per the decision by the Supreme Court, the system of checks and balances was prevented from becoming breached as well as future potential breaches of the system of checks and balances were prevented from occurring over the same or similar issues.

However, in the case at bar, the burden of proof is on Congress to prove that they have a compelling interest to exert their power over the President in this context of recognition. Not only can Congress not fulfill their burden of proof in this matter, as they don't have the constitutional authority to do so, as proven by our first main argument, but the court ruling in the Petitioner's favor would warrant a huge power grab by Congress that would completely revoke the balancing that the Supreme Court has sought to instill between the executive branch and legislative branch with its previous rulings, most notably, the aforementioned ruling by the Supreme Court in NLRB v. Noel Canning. Clearly, this is because the court would be allowing congress to contradict the longstanding practices of this country, and thus would allow congress sufficient standing to contradict other longstanding practices of this country so long as they feel they should be able to so. Essentially, a ruling in favor of the petitioner harms every other government branch by authorizing Congress to be above them in future affairs.

Furthermore, a ruling in favor of the Petitioner would be rather harmful to him as opposed to being beneficial at all. As Just Security asserts, "If enforced [The Foreign Relations Authorization Act, Section 214, subsection d] [would] eliminate certain identifying information that is currently included on the passports of U.S. citizens born in Jerusalem. Today, for example, Binyamin Zivotofsky's passport informs consular officials that he was born in Jerusalem. If he were to prevail in his lawsuit, however, his passport would only tell officials that he was born in "Israel," information that is *less* specific, and less informative, than what currently appears on his passport, and thus less helpful in distinguishing him from other U.S. citizens named Binyamin Zivotofsky." Therefore, an affirmation of the Petitioner's case would not only be a constitutional negative, a breaking of the system of checks and balances, and a horrible precedent in and of itself to set, but would also completely defeat the purpose of the passport system that Congress itself has much jurisdiction over and in a sense limit the identity of Zivotofsky rather than bolster it. Decidedly, ruling in favor of Congress would hurt the exact citizens that the Petitioner claims he is advocating for whereas a ruling in favor of the Respondent would actually be more beneficial to those particular citizens.

Moreover, as Just Security further asserts, "What makes Section 214(d) more constitutionally troublesome, however, is that its utter lack of *useful* function, in the service

of regulating either foreign commerce or U.S. property, makes manifest that, in practice, its only actual function would be to require the Executive to speak out of both sides of its mouth in foreign diplomacy on the question of which nation ought to have sovereignty over Jerusalem. That is the way ordinary audiences overseas (as well as in the U.S.) will understand the U.S. passport practice if the Court rules in Zivotofsky's favor..." Obviously, the law the Petitioner contends as the foundation for his argument should be deemed unconstitutional for the same reason that any law that doesn't help the United States is deemed: that fact that it's unessential. In practice, such a law asks the president to openly contradict himself to foreign audiences, as well as to the United States, with no justifiable reason for doing so. The precedent that would be set by an affirmation of this law forces the President to adhere to Congress on recognition and proclaim something to other countries that he believes to be false. Such dubious belief in the recognition that Congress forces the President to have holds no constitutional objective and only deteriorates the diplomatic relations between the United States and foreign countries and even the President to all Americans. The bottom line is that Congress cannot, and does not, have the constitutional ability to make useless laws that only seek to harm the United States and its relations with the rest of the world. In fact, to allow Congress the ability to do so, would be granting them new powers created outside the confines of the Constitution and again would upset the balance that defines our system of government.

Lastly, the authorization of a law that makes the diplomatic power of the President less effective or essentially ineffective is not within the interest of the United States and should be prevented by this country's earliest interpretations of the executive power. As Justia Law points out, Thomas Jefferson, in 1790, wrote that, "The transaction of business with foreign nations is executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly." Almost a decade later, in 1799, John Marshall, a member of the House of Representatives at the time, "defend[ing] [then] President John Adams for delivering a fugitive from justice to Great Britain under the 27th article of the Jay Treaty, instead of leaving the business to the courts[,]" said that, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him. He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him." In other words, there have been many instances in the context of this nation's heritage in which the power of the executive branch in regards to foreign nations has been challenged, at times by Congress, and has been routinely upheld as the President's will to be done. In closing, if the Petitioner was to win this case, then this nation would be set on a course in which its future decisions would have to hold no respect to this nation's history.

Conclusion

We pray that this honorable court find in favor of the Respondent, Secretary of State John Kerry, thereby upholding the ruling of the lower court. Due to the historic background of the recognition power and the unpreferable effects that would result if the Petitioner case was to be upheld, we believe that it is in this nation's and the world's best interest for this court to rule that the President's recognition power is not subject to control by Congress.
