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Petitioner's Brief: Zivotofsky v. Kerry

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MISCELLANEOUS

A View of the Constitution of the United States, Chapter XX

Blackstone's Commentaries

Commentaries on the Constitution of the United States §§ 1560-62

Consulate General of The United States – Jerusalem, Webpage

Cornell University Law School, Legal Information Institute CRS Annotated Constitution

Edward S. Corwin, The President, 4th Edition, New York University Press (1957)

George W. Bush, Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003

George Washington, To Timothy Pickering, 9 January 1797

George Washington, Questions on Neutrality and the Alliance with France, 18 April 1793

Helvidius No. 1, No. 3

Loius Fisher, The Law: Presidential Inherent Power: The "Sole Organ" Doctrine

Opinion on the Powers of the Senate Respecting Diplomatic Appointments

Pacifius No. 1

Robert J. Reinstein, Is the President's Recognition Power Exclusive?, 86 TEMP. L. REV. 1 (2013).

The Federalist No. 32

The Federalist No. 69

United States Senate, 3 Briefing on Treaties, Webpage

7 Foreign Affairs Manual 1300 – Passport Services, 1300 Appendix D – Places of Birth Names in Passports

10 Annals of Congress. 613 (1800) – Speech by Representative Marshall

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STATEMENT OF ARGUMENT

The issue before the Supreme Court is over the constitutionality of section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, which gives American citizens born in Jerusalem the ability to change their Place of Birth to "Israel." These changes would apply both to United States passports and consular reports of birth abroad. The respondent, Secretary of State John Kerry, rejects the statute on the grounds that it inhibits the President's ability to exercise his diplomatic recognition power. However, the provisions in the Foreign Relations Authorizations Act in totality do not amount to formal recognition of Jerusalem as a municipality of Israel. Congress has implied power over passports and naturalization. Additionally, the legislature has the power and a long history of jointly conducting diplomacy with the executive branch. Therefore, the administrative change of providing the option to list "Israel" on one's passports and consular reports do not overstep Congress' powers, nor do they infringe on the President's recognition abilities.

ARGUMENT

We Will Present Two Core Arguments for the Petitioner

I. Statute 214(d) does not qualify as formal recognition of Israel's claim to Jerusalem.

1. The statute is a constitutional application of Congress' exclusive authority over naturalization and citizenship.

Article I Section 8 of the Constitution expressly states, "The Congress shall have Power ... To establish an uniform Rule of Naturalization...." In The Federalist No. 32, Alexander Hamilton argues that the power to establish "an uniform rule of naturalization... must necessarily be exclusive [to the Congress of the United States]." His assertion is confirmed by both the Supreme Court in Chirac v. Lessee of Chirac, as well as by Congress' long history of passport legislation (i.e. Naturalization Laws of 1790-1802).

Recognizing Congress' authority over naturalization, the question becomes whether regulating the contents of a passport falls under this authority. The Passport Act of 1926 states, "The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States ... under such rules as the President shall designate and prescribe for and on behalf of the United States" (Kent v. Dulles). Ensuing case law over the relationship between congressional authorization and the Secretary of State's "discretionary" power over the issuance of passports has established that the Executive branch's passport authority extends only where congressional approval is explicit or can be reasonably inferred. In Haig v. Agee, the court upheld executive action only after noting, "that the [Secretary of State's] policy... is 'sufficiently substantial and consistent' to compel the conclusion that Congress has approved it" (Haig v. Agee). The Court's opinions in Zemel v. Rusk and Haig v. Agee contain notable dicta in support for extensive executive passport authority; however, rulings in these cases hinge on whether the standard of tacit congressional approval for an executive action is satisfied. While Congress may endorse "the underlying premise of Executive authority in the areas of foreign policy and national security," Congress still retains the ability to regulate passports, pursuant with its inviolable right to regulate all aspects of naturalization (Haig v. Agee).

A passport is defined by the Department of State and Bureau of Consular Affairs as "any travel document issued by competent authority showing the bearer's origin, identity, and nationality, if any, which is valid for the admission of the bearer into a foreign country." A

passport provides proof of identity and citizenship. The court has endorsed this view, calling a passport:

"A document, which from its nature and object, is addressed to foreign powers; purporting to be only 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 recognized in foreign countries, as American citizen; and which, by usage and the law of nations, is received as evidence of the fact." (Urtetiqui v. D'Arcy)

Both definitions, one executive and one judicial, characterize a passport as a form of diplomatic communication only to the extent of affirming the bearer's identity and nationality. It is an individual characterization, and not a statement of national policy. Section 214(d) is within Congress' constitutional right to regulate passports, and not an official recognition of Israel's claim to the international city of Jerusalem. Jerusalem is simply within the municipal and national borders of Israel; without section 214(d), native American-Israelis citizens would be deprived of the ability to accurately and specifically represent their geographic place of birth.

2. The statute does not unduly impinge on the President's ability to recognize foreign states.

The State Department claims "that in the present circumstances if "Israel" were to be recorded as the place of birth of a person born in Jerusalem, such "unilateral action" by the United States on one of the most sensitive issues in the negotiations between Israelis and Palestinians "would critically compromise" the United States' ability to help further the Middle East peace process" (Zivotofsky v. Clinton). The State Department argues this position without any significant evidence to support their claim. Roughly 80,000 registered U.S. citizens reside in the areas administered by the Consulate, and a significantly smaller number would likely choose to change their place of birth to Israel (Consulate General of The United States – Jerusalem). When citizens are born in a place within the boundaries and municipal governance of Israel, it is logical to provide these citizens with the ability to list their place of birth as Israel. Even Israel's capital, as well as its governmental and administrative buildings, reside within Jerusalem. If the Foreign Relations Authorization Act of 2003 only listed Israel on passports to those born in Jerusalem, then the assertion that '"a critical compromise' of the United States' ability to help further the Middle East peace process" would have merit. Yet the Act, signed into law by President George W. Bush,

only provides the option of listing one's place of birth as Israel. This does not amount to formal recognition of Israel's claim to Jerusalem; it simply gives the individual the option of clarifying American Citizens' place of birth on their passports.

Moreover, George W. Bush signed the Foreign Relations Authorization Act into law while continuing to maintain a neutral stance towards Jerusalem. This further suggests that the Foreign Relations Authorization Act does not constitute formal recognition. As asserted by George W. Bush, "U.S. policy regarding Jerusalem has not changed"(Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003). To reiterate, neither the President nor Congress has expressly linked the option to list Israel as formal recognition. If this is the case, than this is a question of whether Congress can conduct international diplomacy to any degree, or if the President is invested with sole authority over diplomacy.

II. The recognition power is not exclusive to the executive.

1. It was the Framers' intent that the powers granted to Congress by the Constitution over foreign affairs grant complicity in recognition and international diplomacy.

It is a gross misunderstanding that the Founders intended Article II, §3, Cl. 4 ("[The President] shall receive Ambassadors and other public ministers[.]"). As expressed by The United States Department of Justice via an assistant attorney to the White House Counsel:

"'It is well settled that the Constitution vests the President with the exclusive authority to conduct the Nation's diplomatic relations with other States,' that 'the President's recognition power is exclusive' and that '[t]he proposed bill would severely impair the President's constitutional authority to determine the form and manner of the Nation's diplomatic relations.'"(Zivotofsky v. Clinton)

The assertion that "the Constitution vests the President with the exclusive authority to conduct the Nation's diplomatic relations with other States" stretches Article II, §3, Cl. 4 far beyond what the Framers and precedent contend. In actuality, the legislature plays an enormous role in conducting diplomacy.

Using an originalist perspective, it was the Founders' intent in the Constitution that Congress be granted complicity in diplomacy. The Founders were reluctant to grant the President too much power, avoiding giving him any semblance of monarchical power. Under the Articles of Confederation the Congress had the power to conduct unilateral diplomacy, "The United States in Congress assembled, shall have the sole and exclusive right and power… of sending and receiving ambassadors"(U.S. Constitution, Art. IX). To suggest that the Framers would then give this entire power to the President is absurd considering their fear of tyranny. When the Framers were drafting the Constitution–in an effort to balance the responsibilities of the executive and legislative branches–they vested partial foreign policy power in both Congress and the President. Therefore, modeled after the intent of the Framers, it would be preposterous to claim that the President has complete control over diplomatic decisions. According to the Constitution,

Article II, §2, Cl. 2 compels the President to secure the advice and consent of the Senate and to some degree the Congress. The President needs consent before producing treaties, an integral part of diplomacy. As Helvidius, Madison points out that "[treaties] are… emphatically declared by the Constitution to be 'the supreme law of the land'" (Helvidius No. 1). Hamilton's emphasis on the legislative nature of treaties advances the idea that the President's recognition power is moderated by legislative authority. Treaties are themselves a form of recognition, binding under international law. An originalist interpretation of Congress' power to approve treaties strongly suggests that the President's ability to affect foreign policy is not unilateral.

The reason why explicit diplomatic function was invested in the President was originally a matter of convenience. According to Alexander Hamilton, "It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner, … " (The Federalist No. 69). Although it may be convenient to invest diplomatic functions in the President, it is imperative to the legislative branch's duties that powers be divided. If the executive were to have absolute control over diplomacy, it would be a gross violation of the separation of powers doctrine: "[The Congress shall have Power…] To declare War, grant Letters of Marque and Reprisal" (U.S. Constitution. Article I, §8, Cl. 11). Joseph Story asserts in his commentaries that "[Recognition power] is not, indeed, a power likely to be abused; though it is pregnant with consequences, often involving the question of peace and war" (Commentaries on the Constitution of the United States. §§ 1560-62). He claims that the recognition power has a direct impact on the nation's ability to conduct peace or declare war – actions that clearly fall under explicit congressional control. James Madison extends

Story's suggestion, stating that, "'[P]utting the United States in a condition to become an associate in war'–nay, 'of laying the legislature under an obligation of declaring war,' what would have been thought and said of so visionary a prophet?" (Helvidius No.3). He is adamant that diplomacy is directly correlated to the war waging capabilities of Congress. Under the necessary and proper clause, the Congress has full power to carry out its assigned obligations (i.e. declaring war), "The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" (Article I, §8, Cl. 18). This justifies his belief that Congress should (and will) wield diplomatic powers. This is crucial to the Zivotofsky case, because Congress is entitled to comprehensive diplomatic powers, in addition to the power of recognizing foreign states.

It is also argued that the President should only hold limited and deferred diplomatic power. William Rawle in his analysis of the Constitution writes:

"The power of Congress on this subject [recognition and diplomacy] cannot be controlled; they may, if they think proper, acknowledge a small and helpless community, though with a certainty of drawing a war upon our country; but greater circumspection is required from the President, who, not having the constitutional power to declare war, out[sic] [ought] to ever abstain from a measure likely to produce it." (A View of the Constitution)

He argues that the President should be held to a much higher scrutiny in his conduct over foreign diplomacy, especially if it can lodge the nation into war. Congress requires analogous far-reaching diplomatic abilities. In order to operate the proper and implied functions endowed by the Constitution, power was divided up between the branches. Yet, the Constitution does not make it explicit as to which branch defers to which on all matters; this makes disputes inevitable. The Founders offer some clarity on the issue– arguing that Congress has supreme and final power over diplomatic matters, including recognition.

The reason that Congress is endowed with recognition power is partly due to its jurisdiction over treaty termination. The President could nullify or ignore treaties that are still operational by refusing to recognize a country, but he has no power to do so. There is overwhelming precedent to suggest that Congress has sole authority to terminate treaties;

"The first case of outright abrogation of a treaty by the United States occurred in 1798, when Congress by the Act of July 7 of that year, pronounced the United States freed and exonerated from the stipulations of the Treaties of 1778 with France" (Cornell University Law).

There are many instances where congressional actions mandate termination of treaties by notice of the President (Cornell University Law). This reinforces the argument that the President should defer to Congress in disputes regarding country recognition. James Madison concurs, stating, "As a change of government then makes no change in the obligations or rights of the party to a treaty, it is clear that the executive can have no more right to suspend or prevent the operation of a treaty, on account of the charge, than to suspend or prevent the operation..." (Helvidius No. 3).

According to Madison, if a country is to change ruling parties or undergo revolution, it is up to the legislative branch, not the executive branch, to determine whether the new ruling "organ" is representative of its people. This again reinforces the concept that recognition should be deferred to Congress.

Madison further clarifies this idea by stating, "Another consequence is, that nation, by exercising the right of changing the organ of its will, can neither disengage itself from the obligations, nor forgeit[sic] the benefits of its treaties" (Helvidius No. 3). Therefore, if a country undergoes revolution or a change of leadership, then its treaties are still operational, making Congress' recognition abilities critical. The President would be grievously overstepping his bounds if he denied a country the benefits of a treaty. Thus, without any congressional ability of recognition, the President could withdraw recognition of a country while there are still active treaties. Drawing from the necessary and proper clause Congress can and must have recognition power, otherwise the President could violate several of Congress' core functions.

One can trace the U.S. policy of a country not being able to "disengage itself from the obligations, nor forgeit[sic] the benefits of its treaties" as early as 1797. A letter George Washington writes to Timothy Pickering proclaims; "That there has been no attempt in the [U.S.] government, to violate our Treaty with that country [of France]. [Or] To weaken our engagements therewith" (George Washington, "To Timothy Pickering"). Washington's precedent affirms that treaties bind to a people rather than a particular government. Thus,

the Founding Fathers were justified in contending for far-reaching congressional powers of recognition.

Drawing from the previous ideas of congressional war power and treaty termination, it is logical to conclude that the President needs to defer to Congress in its recognition powers. William Rawle agrees, stating that: "The legislature indeed possesses a superior power [of recognition], and may declare its dissent from the executive recognition or refusal [of recognition] ... "(A View of the Constitution). William Rawle argues that Congress has superiority in recognizing international governments. The Framers consistently ascertain that the only justified time a government can be recognized is when Congress and the President both concurrently agree, or when the President acts alone and recognizes a foreign body while the legislature is silent (a.k.a. 'zone of twilight'). Joseph Story states that, "If such [executive] recognition is made, it is conclusive upon the nation, unless indeed it can be reversed by an act of Congress repudiating it" (Commentaries on the Constitution).

Using in-depth analysis of the Framers' explicit opinions and commentaries on the Constitution, one can conclusively say that they intended for recognition power to be invested in the legislature. Therefore, Congress' recognition of Jerusalem as a municipality of Israel falls well within the boundaries envisioned by the Founding Fathers.

2. The "sole organ" doctrine has been grievously misinterpreted.

The "sole organ" doctrine is foundational to the executive branch's ability to broadly define presidential power in foreign relations and national security, free from judicial or legislative constraint (Louis Fisher). The doctrine has been used to interpret the President's constitutional duty to "receive ambassadors" beyond the scope of the text, to entail that the President alone possesses the exclusive power to recognize foreign sovereigns. This mistake in interpretation is the heart of the Respondent's case, which asserts that foreign policy is formed and implemented solely by the President.

The doctrine originates from John Marshall's speech delivered to the House of Representatives in 1800. He defends President Adams' authority to implement an extradition treaty with Great Britain. In his speech he says,

"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. He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it... Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the executive department to execute the contract by any means it possesses" (10 Annals of Congress. 613).

The interpretation of Marshall's speech by Justice Sutherland in Curtiss-Wright is considered the legal premise for the sole organ doctrine, as well as the existence of an exclusive presidential recognition power. The issue in Curtiss-Wright was the scope of Congress' ability to delegate legislative power in international affairs. Despite this, the decision written by Justice Sutherland contains expansive and unrelated dicta, declaring:

"...[T]he very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." (United States v. Curtiss-Wright)

His model of executive authority fails to address how, if so unencumbered by statutory or legislative concerns, the power of the executive branch could be constrained. Unlike Marshall, Sutherland uses the sole organ doctrine as a presidential carte blanche–a direct affront to the Framers' careful delineation of the separation of powers in the Constitution.

Sutherland misinterprets Marshall's intent by taking the quotes from his address to the House out of context. In the Curtiss-Wright opinion, "[T]he 'sole organ' doctrine seems to support a plenary, exclusive, and inherent authority of the President in foreign relations and national security, an authority that overrides conflicting statutes and treaties" (Louis Fisher). In actuality, the sole organ doctrine, as delineated by Marshall and reflecting the original intent of the Framers, rejects the idea of vesting exclusive control of foreign relations in the executive branch.

Marshall defended President Adams' actions by emphasizing that the extradition of an American prisoner to the British was pursuant under an article of the Jay Treaty, which was approved by the Senate (United States v. Curtiss-Wright). Marshall's intention in describing the President as the sole organ "was simply the President's role as [an] instrument of communication with other governments... There is no more securely established principle of constitutional practice than the exclusive right of the President to be the nation's intermediary in its dealing with other nations" (Corwin). Sutherland's erroneous interpretation of Marshall's speech equates "sole organ" with unchecked authority. In truth, Marshall's intent was that the President is to be understood as the "sole organ" implementing congressionally approved foreign policy. Supreme Court Justice Scalia recognized this crucial difference in the oral arguments in Zivotofsky v. Clinton, the precursor to this case. He stated that, "To be the sole instrument and to determine the [nation's] foreign policy are two quite different things ... Congress can say ... what the country's instrument [the President] is supposed to do" (Zivotofsky v. Clinton).

3. Post-Ratification history demonstrates an inherent, not exclusive, executive recognition power.

The President's possession of inherent diplomatic powers in indisputable. As the Court observed in Zemel v. Rusk;

"[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress – in giving the Executive authority over matters of foreign affairs – must of necessity paint with a brush broader than that it customarily wields in domestic areas." (Zemel v. Rusk. 381 U.S., at 17)

This statement is preceded by a reference to Marshall's sole organ doctrine, indicating that while the President may necessarily enjoy inherent power over foreign relations, that power must be predicated to some degree by congressional legislation.

Historical instances of the President's exercise of recognition occur only with explicit or tacit congressional approval. In the recognition crisis of 1792, Washington legitimized the French Revolutionary government without congressional authorization. His actions are notable for their confirmation of the President's inherent ability to affect foreign policy. However, his recognition of France is not proof that the President possesses an exclusive recognition power when Congress declines to take action (Reinstein).

4. The tripartite test established in Youngstown Sheet & Tube Co. v. Sawyer validates section 214(d).

The tripartite test described by Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer is the consistent with Marshall's sole organ doctrine. The test states that, "presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." The strength of presidential power is measured at three levels. He "personifies the federal sovereignty" only at the first level, where the President operates with the express or implied authorization of Congress. In instances of congressional silence, the President and Congress operate at the second level, in a "zone of twilight" where the distribution of power is uncertain. At the third level, where the President acts in opposition to Congress' express or implied will, his power is at its "lowest ebb."

In Youngstown, President Truman's executive order, which authorized the expropriation of many of the nation's steel mills, was found to be unconstitutional. This evaluation, applied to an executive order based on the President's wartime authority as Commander in Chief, should be extended to the question of the President's recognition power. The Respondent's defense of the President in this case directly opposes Congress' will, expressly stated in Section 214(d). While an inherent executive recognition power is a necessary reality, the tripartite test affirms that the "concurrent and ultimately controlling" Congressional power to regulate passports, pursuant under Article I Section 8, prevails over

the authority of the policies outlined in a State Department manual (Reinstein) (7 Foreign Affairs Manual 1300 Appendix D – Places of Birth Names in Passports).

CONCLUSION

The matter before the Supreme Court in Zivotofsky v. Kerry is a matter of administration, not of recognition. Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003 is not formal recognition of Jerusalem as a municipality of Israel, but rather a citizen's individual choice to express his or her affiliation to Israel. Passport regulation is a subset of naturalization–a power expressly granted to Congress in the constitution and confirmed by multiple court rulings. The Respondent argues that Section 214(d) would "critically compromise" relations in the Middle East, but these claims are disproportionate to scope of the statute. George W. Bush signed the Foreign Relations Authorization Act into law while maintaining a neutral stance towards Jerusalem, indicating that the change in passport policy does not qualify as formal recognition. Additionally, the Court is faced with the issue of whether an "exclusive" executive recognition power can be used as grounds to nullify law. Although Article II, §3 of the Constitution provides far-reaching foreign relations powers to the President, in order to create a homeostatic balance of the Separation of Powers, Congress is granted parallel powers, including the ability to validate treaties and declare war. The precedent set in United States v. Curtiss-Wright is founded on erroneous dictum that misinterprets John Marshall's "sole organ" speech. According to several analysts, the "sole organ" speech should be understood to mean that the President is responsible for implementing foreign policy – policy that Congress would determine and direct. This concept of concurrent foreign policy power is further backed by the Pacificus-Helvidius debates, which put forward the idea that, while the president may act unilaterally in the interest of efficiency, his actions remain subject to legislative authority. In this regard, history provides examples of an inherent, but not exclusive, executive recognition power. Under the Youngstown tripartite test, the President's use of a nebulous, inherent recognition power to counteract legislation pursuant with Congress' express naturalization power is untenable. In this case, preserving the separation of powers enshrined in the Constitution for U.S. foreign relations today demands that the Supreme Court acknowledge the constitutionality of Section 214(d) by ruling in favor of the Petitioner.
