

Respondent's Brief I Lake Oswego High School

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I.

TABLE OF AUTHORITIES

Zivotofsky v. Clinton

US v. Curtiss-Wright Export Corp.

Zivotofsky v. Kerry

Foreign Authorization Act

US Constitution Article II § 3

Pacificus 1

Articles of Confederation

SCOTUSblog

The Monroe Doctrine

The Oregon Treaty

II.

STATEMENT OF THE CASE

The question at hand is, “who holds the power of recognition?” and “whether a congressionally enacted statute that directs the Secretary of State, upon 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?’”.

1. Background

In 2002, Congress passed the Foreign Authorization Act, directing the State Department to record Israel as the country of birth on the passports of Americans born in Jerusalem, if their parents so request it. After this law was enacted, Menachem Zivotofsky was born in Jerusalem and his parents requested that the State Department list the birthplace on his passport as Israel instead of Jerusalem.

The department, however, denied his parent’s request, causing Zivotofsky to sue the United States government. Federal district court denied taking a stance on the grounds that “necessarily require the Court to decide the political status of Jerusalem.” Federal appeals court also stated that this case presented a political question, which was not appropriate to review.

For more than 60 years, the Secretary of State, acting for the President, has not recognized any country as having control over Jerusalem and thus, any person born in Jerusalem is issued a passport stating that Jerusalem is their place of birth, not Israel. Though the Secretary of State argues that this is indeed a political question, the Supreme Court has decided to take this case.

B. Court Proceedings

In *Zivotofsky v. Clinton* in 2012, the Supreme Court disagreed with both the federal district court and federal appeals court, saying that the case was not a political question and thus they can make a ruling, officially announcing that *Zivotofsky* can have judicial review. Supreme Court Justice Stephen Breyer, however, disagreed with his colleagues, and aligned with the State Department in saying that it is a political question due to the fact that this issue “arises in the field of foreign affairs...the court may have to evaluate U.S. foreign policy no strong interest or right is at stake” [and] “the conflict between Congress and the Executive can be resolved through non-judicial means.” He took the stance that it is not possible to look at this question without having to look further into international affairs, which turns into a long standing political issue between the United States, Palestine, and Israel.

III.

ARGUMENTS

- Both the founders and the constitution itself have obviously intended for the executive to hold the power of recognizing foreign nations.

The President and the President alone holds the recognition power to recognize foreign states or governments. Whether the United States recognizes Jerusalem as being part of to Israel is the executive’s decision. For this reason, the Secretary of State, John Kerry, is in the right in denying *Zivotofsky* the right to put the birthplace of Israel on his American

passport. The official position of the Obama Administration is that it is within the power of the president whether to recognize Jerusalem as part of Israel. The right to recognize foreign states or governments is found in the US Constitution in Article II section 3, which states, [The President] “shall receive Ambassadors and other public Ministers” (Article II section 3). It explicitly states in the text the right of the president to deal with foreign affairs, having the ability to appoint ambassadors, make treaties, and receive ambassadors and other public ministers.

These explicit powers of the president have, over time, turned into the implied power of recognition, being the power of recognizing foreign nations. The issue here is whether or not “receiving” may turn into “recognizing” other foreign nations, and thus significantly altering that nation’s relationship with the United States. The president has been able to recognize other nations by using his power to receive their ambassadors. By receiving ambassadors, the executive is recognizing a nation officially. In this case, the president has the power to recognize Jerusalem as its own country, as a city inside of Israel. His power to do this is derived from Article II of the constitution, most specifically in section 3. The power of receiving ambassadors and other public ministers has turned into the implied power of recognition, and thus we must turn to this section of article II in order to answer the question of why congress is infringing upon the executive’s right to put Jerusalem on American passports.

The power of recognizing Jerusalem as its own country, and the power of recognizing other foreign countries in general can be derived from the founder’s statements and others concerning the framing of the Constitution, along with its intent in outlining presidential power. In *Pacificus*, Alexander Hamilton’s pseudonym, he clarified the executive’s power in deciding foreign affairs, when supporting George Washington’s decision on neutrality with France during the French Revolution. He stated that “The Legislative Department is not the organ of intercourse between the United States and foreign Nations. It is charged 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. Executive Power of the Nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument.”

Hamilton intended that foreign power be vested in the executive and the executive only. He states that congress only has power over the government where explicitly stated. In non explicit instances, the president has full power over the situation. The legislature is not naturally involved with the United States' foreign affairs and therefore, should not be granted any recognition power involving Jerusalem or any other country. Congresses role, as outlined clearly in Article I of the constitution, include approval for spending, consent for finalizing of trade agreements and certain war powers. None of these powers include or were meant to include recognizing foreign nations.

Thomas Jefferson adds to the idea that the executive was meant to hold recognition power when he describes his vision on the senate's strict and limited roles in regards to respecting diplomatic appointments. He states, "The transaction of foreign business with foreign nations is executive altogether. It belongs then to the head of that department. The Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive department." He goes on to elaborate on exceptions to the executive's role: "...except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly. The constitution itself indeed has taken care to circumscribe this one within very strict limits." It is clear by his point of view that there was intended to be a firm separation of powers between congress and the executive when it comes to foreign affairs. The recognition power, thus, is solely in the hands of the president, not jointly exercised between both branches. The senate was intended to only exercise the foreign powers that were explicitly assigned to them within the constitution.

The United States's early political figures touch on the importance of the executive's explicit receiving power when dealing with a country in political distress. St. George Tucker, an American lawyer and professor, as well as judge of the General Court of Virginia and later on the Court of Appeals in the late 1700s, stated, "The president, alone, has authority to receive foreign ministers; a power of some importance, as it may sometimes involve in the exercise of it, questions of delicacy; especially in the recognition of authorities of a doubtful nature."

Joseph Story, an American lawyer and jurist who also served on the US Supreme Court from 1811-1845 stated, "The power to receive ambassadors and ministers is always an important, and sometimes a very delicate function; since it constitutes the only accredited

medium, through which negotiations and friendly relations are ordinarily carried on with foreign powers.” He adds that “A delicate occasion is, when a civil war breaks out in a nation, and two nations are formed, or two parties in the same nation, each claiming the sovereignty of the whole, and the contest remains as yet undecided...In such a case neutral nation may very properly withhold its recognition of the supremacy of either party.” Both St. George Tucker and Joseph Story bring up a situation that very closely relates to the matter in question: how recognition should be dealt with in a particularly fragile situations. Being that Israel and Palestine will both react to either side being recognized as having power over Israel, it is a very delicate situation.

By Zivotofsky being given “Israel” on his passport instead of simply regarding Jerusalem as its own entity, the United States will be taking a side. Not only is that a politically risky thing to do, being that the United States has a specific relationship with both Palestine and Israel, but it is also violating the president’s recognition power. The United States has chosen not to choose a side between Israel and Palestine since the late 19th century and has successfully stayed out of this conflict. If they do choose a side, however, it must be the president’s call, especially in this situation of significant delicacy.

In regards to previous doctrine involving the international authority of the executive in comparison to that of the legislative the standard is clear as shown through *United States v. Curtiss-Wright Export Corp.* Congress, in joint resolution, had given the president the option to place an embargo on nations located in South America that had engaged in the Chaco War. This case came to light after Curtiss-Wright Export Corp. sold fighter planes and bombers to Bolivia, violation the embargo. The company was prosecuted.

The Curtiss- Wright Export Corp. defense argued that the embargo and proclamation were

international relations the President has “plenary and exclusive power... in the field of international relations”.

Specifically Justice Sutherland stated: “It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the 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”. The court continued, “there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the reestablishment of peace in the affected countries”.

This case then clearly set the standard that when it comes to international affairs involving issues of the peace and stability of other nations the president has broad discretion. As such, in the instance of Jerusalem it is important to the peace and stability of the city as well as the diplomatic relationship between The US, Israel, and Palestine so we can assume that the President has the authority to determine what the effect of enforcement of the Foreign Authorization Act will be and act accordingly. Also based off of the statements of Justice Sutherland we can extrapolate that the president does hold exclusive power over international relations and therefore the president has the standing to regulate the Foreign Authorization Act as he sees fit.

- In a historical context, it is clear that the congressional approach to foreign policy is ineffective and we must look to the reason that the executive was first established: to have a sole authoritative voice when dealing with political issues.

There is a reason why alternative negotiations in past context have appeared as treasonous. You can see in the early years of the US from Aaron Burr’s conspiring to seize Spanish lands to Edmond-Charles Genet recruiting citizens of South Carolina to fight for the French during their revolution, acts of diplomacy lacking the structure and authority of the executive branch have fallen flat and ultimately resulted in disastrous repercussions. This form of diplomacy in which congressmen and senators were allowed to negotiate independently of the other branches revealed a weakness of the United States.

The congressional branch is not a united branch so therefore how can they provide a united front by which the US can establish a consistent foreign policy? The reason that the United

States needed to scrap the Articles of Confederation was because of the fact that only having congress was not working, and that in order for there to be a stable government, a centralized symbol of authority was needed. The president is the figurehead of America, and is essential for displaying a consistent and united front for foreign nations. For this reason, the president has been using his recognition power, through his secretary of state (in this case being John Kerry). The president has long been able to use his own determinations for issues involving foreign affairs, and thus should be trusted to do so now.

In 1933, President Franklin D. Roosevelt used his recognition power to formally recognize the Soviet Union, after 16 years of non-recognition. He had the power to do so through his explicit ability to assign ambassadors and receive their public ministers, which has turned into the power of recognition. The Monroe Doctrine, written by James Monroe, is another example of the president's unilateral ability to exercise power for relationships with foreign nations. Instead of having to speak through congress to develop relationships with foreign nations, Monroe was able to solely outline an American stance. President James Polk established the Oregon treaty with Britain in order to dissolve the dispute between the United States and Britain over the Oregon Territory. President Nixon's trip to China is another display by which the president used his authority to recognize a nation (China) with which diplomatic relations had been previously cut off. For all of these examples, it took the united front of the president to dissolve issues and decisively establish American foreign policy. Being that he has been elected to do so, he should be trusted to continue to exercise these powers, such as recognition of Jerusalem as a country.

IV.

CONCLUSION

It is clear through a historical context that president, as the figurehead of our nation represents our nation in a foreign context and by extension is the authority in US foreign policy. The result of this case should be clear in that all past examples demonstrate the necessity that is the executive power of recognition and presidential authority in foreign matters.

