Respondent's Brief II Lake Oswego High School

Lake Oswego/ Respondent Brief

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I: Table of Cited Authorities:

The Constitution of the United States

Text of the Foreign Relations Authorization Act, Fiscal Year 2003

Joseph Story, Commentaries on the Constitution 3:§§ 1517, 1559–64

Letters of Helvidius, 5 Writings of James Madison, G. Hunt ed. (New York: 1905), 133.

Moore, International Law Digest (Washington: 1906), 243-244. See American Law Institute, Restatement (Third) of the Law, The Foreign Relations Law of the United States (1987), Sec. Sec. 204, 205.

Harry Truman Administration Press Release Draft: United States Grants De-Jure Recognition to Israel

II: Statement of Argument:

In the question of whether the President's recognition power is subject to control by the Congress, the answer is a definitive no. Due to the extensive precedent for Presidential recognition power, a historical ratification of this specific authority is apparent and looking towards the implications of the overarching power in the specific case of Zivotofsky v. Kerry, the very question of legitimacy is rooted in the creation of Israel as an independant nation, and any encroachment upon the President's authority in this regard would be an encroachment upon Israel's statehood. The implicit power is illustrated in Article II Section III of the constitution, with the President's power to "receive ambassadors and other public ministers"; the clause declares the duty of the President and naturally extends to the power to clarify the legitimacy of governments and their subsequent national boundaries. The President's recognition power for the greater portion of the 20th century was clear, with notable examples including Taiwan, Cuba, and Israel. The power itself is

embodied within the constitution with founders believing in the President's sole power to declare the official list of recognized foreign entities, dating back to the French Revolution. No specific powers of Congressional recognition are implied in the Constitution, whereas the President, and postliminary Executive, is charged with operating upon principles of weighing the interests of the United States, while obeying laws enacted by Congress.

III: Argument:

1. Perhaps most apparent when addressing the legality and scope of the presidents recognition power is what can be extrapolated from the constitution. Article II Section Three unequivocally lays foundation to the presidents capacity of recognition in regards to foreign ambassadors, "Article II, §3: [The President] shall receive Ambassadors and other public Ministers[.]" Article II Section 2 also serves to indicate the president's ability to appoint Ambassadors, "Article II, §2, Cl. 2: [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors[.]". The President has the sole power to make this original decision of recognition then in this case, due to its ability to accept, or recognize individuals within fractious states. The respondent does not dispute that the Legislative branch has means of necessary recourse available to them, but in this circumstance the proper reading of the constitution quite clearly indicates that the matter of recognition lies solely in the realm of executive power. Former United States District Attorney, William Rawle stated " The power of congress on this subject 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, ought ever to abstain from a measure likely to produce it." Drawing further from the work of Rawle can lead to a disparity between the two branches in regards to recognition power; he makes clear the reality that in situations where official recognition of a party might lead to disastrous conflicts in unstable regions, or serve to exacerbate existing geopolitical conflict, it is quite clear that the most apparent and obvious course of action is to allow the president to utilize recognition power to stop congress from making critical missteps or from acting without a timely haste. Unlike Congress, the president has the unique ability to act with an efficiency that is not prescribed to the two remaining branches and in the situation where the acknowledgment of a specific locality would have a very tangible and immediate effect on geopolitical relations the respondent argues that the courts must view this relation as a balancing act. The presidents recognition power must be valued and preserved over congressional

authority when, should the circumstances arrive, there is reasonable belief that recognition would have the potential to further instigate discord in regions of relative risk; a belief which we hold should be decided by the courts after the fact, as is the instance of this trial. In the circumstances of Israel and Palestine this would most certainly be the case; regardless of how the court rules on our previous claim that recognition power is solely the presidents should the court find that recognition power is a shared privilege we would move to have the court balance the risks between arbitrating for, or against, Zivotofsky keeping in mind the greater scope of the situation and the multitude of multilateral implications that could arise based on the rendered decision. This was quite similar to the way that Nixon interacted with China during the midst of the Cold War and how he explicitly served as the only form of communication between two states, solidifying the precedent for the president to have executive control over foreign relations.

2. The second key issue to be addressed when regarding the availability of the power of recognition to the president is understanding the modes of communication and the fragile premise upon statehood rests. To quote Joseph Story, a supreme court justice serving from 1811 to 1845, "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. A government may in its discretion lawfully refuse to receive an ambassador, or other minister, without its affording any just cause of war. But it would generally be deemed an unfriendly act, and might provoke hostilities, unless accompanied by conciliatory explanations. A refusal is sometimes made on the ground of the bad character of the minister, or his former offensive conduct, or of the special subject of the embassy not being proper, or convenient for discussion. This, however, is rarely done." Justice Story clearly indicates that the acceptance of an ambassador is not a trifling matter, and not a matter of personality. The president doesn't dismiss or refuse to recognize an ambassador merely because they did not wish to eat green eggs and ham despite Uncle Sam's request. The act of rejecting an ambassador stems from purely political reasons, as opposed to personal ones. This acceptance of an ambassador is the preliminary, and a political necessity, to further diplomatic relations between two countries, and requires immediate action in certain cases; Story reaffirms the importance of Ambassadorial recognition in stating "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, flagrante bello. In such a case a neutral nation may very properly withhold

its recognition of the supremacy of either party, or of the existence of two independent nations; and on that account refuse to receive an ambassador from either."The act of acceptance serves as a consolatory nod of acceptance to an opposed nation in question: "Yes, you exist and I admit that you exist and I am willing to talk to you". Mr. Story further goes on to illuminate a very critical point in the understanding of the political necessity of recognition via ambassadors, in a situation of belligerent nations or internal divide a nation may wish to deny diplomatic conversation with one, or both, of aforementioned belligerents. This can be done by rejecting their Ambassadors due to an almost implicit tacit acceptance of the fact that an ambassador is critical to diplomatic relation. Given that the Constitution of The United States, in Article 2, Section 3, clearly delineated the power of accepting and/or receiving ambassadors to the president it stands to reason that the president has the sole power of accepting and/or receiving ambassadors. It is in this way that it becomes most apparent that the power of recognition has been clearly delivered to the presidents list of executive powers, and that is has been done for a very specific reason. Additionally the recognition of a state usually only occurs through the recognition of Ambassadors, dating back to the early French practice of Agrément. Even more convincingly is what is later exposed in Justice Story's explanation, "These, however, are propositions, which have hitherto remained, as abstract statements, under the constitution; and, therefore, can be propounded, not as absolutely true, but as still open to discussion, if they should ever arise in the course of our foreign diplomacy. The constitution has expressly vested the executive with power to receive ambassadors, and other ministers. It has not expressly vested congress with the power, either to repudiate, or acknowledge them. At all events, in the case of a revolution, or dismemberment of a nation, the judiciary cannot take notice of any new government, or sovereignty, until it has been duly recognised by some other department of the government, to whom the power is constitutionally confided." Provided that we're to act under the assumption that the constitution was, as a document, crafted deliberately this statement speaks directly to the complaint at hand. First, the Constitution's specifically grants the executive branch the power of recognition of ambassadors while not granting any such powers to congress; this is consistent with the general trend of the constitution in regards to presidential power over foreign policy, or the powers of recognition. Any attempts to limit, change, alter, or otherwise interfere with the presidents powers of recognition by congress serve as mere suggestion to the president as anything else would serve to directly limit and change powers granted to the executive branch by the constitution.

3. Finally is a look at previous precedent set by both congressional acceptance and presidential action in three uses of recognition power; Israel, Taiwan, and the French

Revolution. First, and perhaps most telling of these historical anecdotes, is the method in which Israel was recognized as a state. In regards to Israel, the President was the sole authority in recognizing the nation as indicated by the method of receiving ambassadors. First Truman authorized de facto recognition via Executive Statement, following this recognition Truman authorized de jure recognition of Israel as a foreign state in a subsequent memo. The very fact that this was a series of actions explicitly carried out president Truman, during a period of political dissent over Israel's statehood in Congress, serves to indicate that recognition power is vested primarily, if not solely, at the executive level. This serves to indicate a problem with brief in representation of Mr. Zivotofsky: If the president doesn't have the ability to determine recognition, or level of recognition, in a diplomatic capacity in regards to foreign nations then the act of recognizing Israel as an independent foreign nation was a breach of constitutionality and Israel should, legally, be no longer de jure recognized by the United States Federal Government and its affiliated territories. Looking back to the French revolution it becomes aggressively apparent that this idea of power of representation was used by the Executive branch explicitly while the founding fathers were actually alive. This is a most telling example of how powers of representation were intended to be appropriated and utilized. The President's recognition power was crystallized when Madison attempted to minimize the President's power of reception, in 1793 in regards to recognizing the Treaty of Amity and Commerce with France; following the deposition of Louis XIV. Hamilton argued that France should no longer be recognized as a legitimate nation, as mobs replaced institutions of order. Secretary of State Thomas Jefferson, however, held that the French people had the right to form a new government, and with treaties binding nations over governments, the removal of a treaty would be unjust. President George Washington agreed with Jefferson and declared United States recognition of France, and in doing so, set precedent for further Presidential recognition. Further testament to the fact that the powers to recognize ambassadors and recognize states comes from a policy of the People's Republic of China; explicitly the People's Republic of China policy in regards to the Republic of China. The PRC makes it stringently clear that they will refuse to maintain diplomatic relations to any and all nations that recognize Taiwan as the ROC. In a situation where Obama were to accept an ambassador from the ROC this would have massive and untenable political backlash; should he accept an ambassador from Taiwan, however, there are substantively fewer negative ramifications. During the Nixon Administration as the Cold War was getting colder, Nixon himself flew to China in 1972 in an attempt to normalize relations. This example serves to be one critical to understanding the presidents historical role in diplomatic relations. First, Nixon was primarily responsible for arbitrating and creating decisions; he made decisions in China without congress in an attempt to

resolve conflict. Secondly, and perhaps more tellingly, was that Nixon himself was one of the only individuals to speak with Chairman Mao or to have any real negotiations. No member of congress ever set foot in China, the Secretary of State wasn't allowed to meet with Mao, and Nixon, the President, was. These three events establish clear precedent that the President has the power to recognize nations over congressional opposition. Historical evidence serves to reaffirm the fact that an originalist or textualist interpretation clearly extends a reason to side with the respondent. The singular fact that the founding fathers believed that the powers of recognition were situated within the sphere of influence of the executive sector undermines the Appellant's claims.

IV: Conclusion:

Presidential recognition power presents a unique way for the United States to handle foreign diplomacy, as it allows for a system of recognition that is both quick and isolated from political gamesmanship. The United States has maintained a longstanding policy of upholding precedent formed upon the basis of treaties and historical recognition; if the Supreme Court finds that the President does not possess the authoritarian discretion to declare United States policy in dealing with foreign nations, the recognition of Israel in itself is questioned. In addition to the violation of precedent the shift in power from the Executive to Legislative would mark the tide of power, as an originalist and textualist approach is abandoned. This departure would undermine the Constitution, and rewrite the United State's process of diplomacy to a point of dangerous politicization.
