

Wicomico High School Respondents Briana and Apeksha

Briana Branch and Apeksha Ghutatker

Zivotofsky v. Kerry

Respondent brief

Table of Cited Authorities

- Article 2 section 3
- Article 1 section 8 clause 3
- Article 1 section 8 clause 5
- Article 1 section 8 clause 10
- Article 1 section 8 clause 11
- Pacificus No. 1 (Alexander Hamilton) 1793
- William Rawle a view of the constitution of the U.S. chapter XX 1829
- Restatement (second) of Foreign relations section 94 (1)
- Banco Nacional de Cuba v. Sabbatino 376.U.S.398 1964
- Helvidius No.3 (James Madison) (1793)
- Section 214 (d) Foreign Relations Authorization Act
- Thomas Jefferson opinion on the powers of the Senate respecting diplomatic appointments
- The federalist no. 69 (Alexander Hamilton)
- 1788 Statement of Archibald Maclaine (North Carolina Ratifying Convention)
- Joseph Story's Commentaries on the Constitution in 1833

Statement of Argument:

No president in the history of the United States of America has ever recognized Jerusalem as a part of Israel, because of the possibility of war breaking out. In 2002, congress passed the Foreign Relations Authorization Act, which allowed U. S. citizens born in Jerusalem to request to the Secretary of State to record their place of birth as Israel rather than Jerusalem. The petitioners argue that congress does have a say in the recognition process and also that the president is subject to laws made by congress in regards to the recognition power. We as respondents believe:

- The recognition power is exclusive to the president of the U.S.
- The recognition power of the president is not subject to any limitations by congress.
- The Section 214 (d) of the FRAA that congress passed is unconstitutional on the grounds that the president's recognition powers are not subject to any limitations by congress.

Argument:

The recognition power is the power that allows a representative to decide whether a state is a state or not, which can be found in Restatement (second) of Foreign relations section 94 (1). This scope can extend to making independent decisions about recognizing state authorities, receiving foreign ambassadors and public ministers and recognizing foreign nations.

The president can unilaterally decide whether or not to recognize a foreign (or state) government. According to the constitution, article 2 section 3, the president reserves the right to receive foreign ambassadors and other public ministers. The reserved power which allows the president to receive foreign ambassadors and ministers is a major part in the recognition power as previously defined. The constitution does grant congress with the power to declare war, grant letters of Marque and Reprisal, and rules concerning captures on land and water, congress can regulate commerce with foreign nations, congress can also regulate the foreign value of coins, and define and punish crimes committed at sea. Although the Constitution grants congress with some foreign involvement it doesn't involve them in the actual recognition power which is given to the president. If a president hasn't recognized a foreign nation then congress will not be able to think about carrying out diplomatic relationships with that nation until the president has formally recognized the nation. Alexander Hamilton mentioned in a debate (Pacificus No. 1) that "for until the new Government is acknowledged, the treaties between the nations, as far at least as regards public rights, are of course suspended." In this Hamilton means, if the president hasn't acknowledged a foreign nation, all treaties and relations are invalid and void. In William Rawle's *A View of the Constitution of the United States*, Chapter XX (1829), along with the president's power to receive foreign ambassadors comes the job deciding if a foreign country and its rulers should be recognized which is again the definition of the recognition power. So, overall congress' foreign affairs powers are dependent upon the president's power of recognition. According to the 1788 Statement of Archibald Maclaine (North

Carolina Ratifying Convention) “Congress are not to be sitting at all times, they will only sit from time to time, as the public business may render it necessary. Therefore the executive ought to make temporary appointments, as well as receive ambassadors and other public ministers.” Maclaine realized that if the legislative branch was given the power of recognition, they would have to convene every time a new minister or foreign ambassador came to America. In Federalist No. 69 Hamilton also mentions how the president’s role is “more of dignity rather than of authority”, this means this role was more convenient this way. This also confirms how the power was given to the president because it was more convenient this way. According to James Madison (Helvidius No.3) in 1793 the executive is most fit for this job because he is the most proper, Madison says, “if anything, more was intended by the clause, than to provide for a particular mode of communication, almost grown into a right among modern nations; by pointing out the department of the government, most proper for the ceremony of admitting public ministers, of examining their credentials...” The president’s role here is described as a role of communication but important for the U.S. These sources show the scope of presidential power to, from breaking or creating diplomatic relations with foreign governments to his role as a communicator between the U.S. and other governments. This ties into the case at hand because it reiterates what the president is and isn’t allowed to do. This proves the president has the recognition power.

The recognition power is not subject to any laws enacted by congress. In William Rawle’s a view of the Constitution of U.S. he says, congress may express their discontent with the president’s actions, but they cannot use their foreign affairs powers to contradict his or her decision. According to Pacificus No. 1 (1793), which was written by Alexander Hamilton, congress is not the center of relations between the U.S. and foreign governments. He also believes the job of the congress is to enforce the presidential decision, by carrying out their diplomatic relations with the country that the president recognized. This means the congress is not involved in actually recognizing a country but they are involved in and responsible for implementing the president’s decision and watching over the implementation of the decision. If the congress does try to use section 214 (d) of the FRAA, then it is an attempt to violate the president’s power of recognition.

The section 214 (d) of the FRAA (Foreign Relations Authorizations Act) that congress

contradicts the president’s decision to not recognize a country (by giving the citizens a

choice and letting them put Israel as birth country can equate to recognition) and that “impermissibly infringes on the President’s exercise of the recognition power.” In William Rawles A View of The Constitution, he states, “For transactions in regard to foreign nations, “that the president has an arduous task. Here he must chiefly act on his own independent judgment.” This gives importance to the president’s decision and once again establishes the power as exclusive to the president. This ties into the argument that the president’s power is exclusive and can’t be curbed by congress. But another point this excerpt brings up is that the even though the legislature may express their dissent, “The act of the executive is binding.” Now for this case section 214 (d) clearly contradicts the president’s decision. The president has chosen not to recognize Jerusalem as part of Israel but this section of the act lets people choose whether they want to have Israel as their birth country which can equate to recognizing Jerusalem as part of Israel. This would let congress unconstitutionally infringe upon the president’s powers. Since the President has the recognition power, Congress stepping in and directing the Secretary of State, if requested, to put an United States citizen’s birthplace as Israel if they were originally born in Jerusalem is unconstitutional because as stated in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) if the United States does not recognize a state, or country in this matter as was stated that the scope of the recognition power extends that far, it also means that the United States is going against recognizing the territory that the state, or country, is trying to claim. This means that since the President has not yet recognized Jerusalem as a part of Israel that Congress’s law is void. Congress has no grounds to declare that a U.S. citizen’s birthplace can be placed as Israel if they were born in Jerusalem because Jerusalem has not been recognized as a part of Israel at any time so any laws or possible treaties saying that Jerusalem is a part of Israel is false and should not be carried through. Thomas Jefferson’s opinion on Senates Powers in regard to Diplomatic Appointments says “The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department.” Other than jobs left strictly to the Senate by the Constitution the powers belong to the president exclusively. And in this case, section 214(d) is an attempt by congress to curb the president’s powers.

Conclusion:

In brief, the recognition power is a power that is meant for the President of the United States without the assistance of our Congress. This as we have proven before is a power that is exclusive to the president; it can also be extended to receiving foreign ambassadors and recognizing foreign countries. So if a president refuses to meet with a foreign ambassador it can amount to him not recognizing that government. This is a powerful tool and also a very delicate one (because it could provoke hostilities) as mentioned in Joseph Story’s Commentaries on the Constitution in 1833, he also mentions, “The constitution has expressly invested the executive with power to receive ambassadors, and other ministers. It

has not expressly invested congress with the power, either to repudiate, or acknowledge them.” Joseph Story’s point—that the constitution has confided the president with this exclusive power—is shared by other framers and political minds such as Alexander Hamilton and Maclaine who expand on the responsibilities of the president in dealing with foreign nations. This proves that the constitution confided the executive with this job because they understand it is a very delicate job and they cannot convene the congress every time there is a new ambassador coming to the U.S.

In entirety, the scope of his power extends to being able to make independent decisions about whether or not a country should be recognized, this means, congress should not have any role in the recognition process. Lastly the FRAA

The President alone was granted powers in the Constitution and that coincide with the duties of the recognition power while Congress has no duties that include them in the recognition power format. As said before, the outcome of this case should be in the favor of the Respondent who says that the recognition power is a duty of the President and the President alone. Hand in hand with this issue was the section 214 (d) of the FRA passed by Congress. Petitioner Zivotofsky argues that a birth place on a passport does not equate to a formal recognition, but putting the birthplace of someone who was born in Jerusalem as Israel acknowledges the fact that Jerusalem is a part of Israel so basically the section 214 (d) passed by Congress that allows them to tell the Secretary of State, by request, to put Israel as the birthplace of an United States citizen who was born in Jerusalem is unconstitutional because the President has not now or in the past years recognized Jerusalem as Israel’s which means that Congress has no power to allow this. We believe that the section 214 (d) of the FRAA is unconstitutional and should be discontinued. We believe the Supreme Court should rule in favor of the Respondent, supporting that the President is in charge of the recognition power and Congress, in no way, shape, or form, interferes with that power and is not as involved as Zivotofsky believes.