

Petitioner Brief Lake Oswego High School II

I TABLE OF CITED AUTHORITIES

The Constitution of the United States

Federalist No. 69

Blackstone's Commentaries

St. George Tucker in Blackstone's Commentaries

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579

Joseph Story, Commentaries on the Constitution of the United States §§1560-62

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

Helvidius No. 3

Evelyn Goh, Constructing the US rapprochement with China

Rubenberg, p.27-28

RESTATEMENT (SECOND) OF FOREIGN RELATIONS §94(1)

II STATEMENT OF ARGUMENT

In the case of *Zivotofsky v. Kerry*, it is the position of the petitioner that the president's recognition is subject to oversight and control by Congress. This position is based in textualist and originalist arguments which would indicate that the founders never intended for one person alone to have control over such momentous decisions. The case delves into not only the recognition of governments and the borders in question, but also the overlap of congressional authority in matters of foreign diplomacy. While it would seem that Article II section III of the Constitution gives the president the power of recognition through the acceptance of ambassadors, the verbiage of this clause would indicate that this is a duty of the president, rather than a power. This interpretation is supported by multiple documents written by the framers. Furthermore, the clause question is the only clause in the constitution in which the executive carries out a diplomatic action without

congressional approval or intervention. This position is supported by the specifics of the case and the nature of the recognition in question.

III ARGUMENT

The most critical element of the petitioner's argument is the fact that such a momentous and weighty decision should never, and in fact was not, left to the judgement of the executive alone.

Recognition is defined by RESTATEMENT (SECOND) OF FOREIGN RELATIONS §94(1) 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," The powers of the president enumerated in the Constitution are found in Article II, with that relating to recognition found in section III. Article II, §3: [The President] shall receive Ambassadors and other public Ministers[.] The most critical element of this section is the use of the word "shall" alone, as opposed to "shall have Power." The verbiage of article II section III would seem to indicate that receiving ambassadors, considered an integral part of the act of recognition, is a duty, or obligation of the president, rather than a power of choice. This is supported by the verbiage of article II section II clause 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[.]" When a power is delegated to an entity in the constitution, it is done so explicitly, and in the case of receiving delegates from other nations in an act of recognition, this is clearly not a power delegated to the president, but a ceremonial duty bestowed upon him, to be fulfilled at the advice of another entity.

Moreover, the president has no other powers in foreign matters which are not subject to some oversight by Congress. The president's powers are outlined in Article II, section II. Article II, §2, Cl. 1: The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States[.] 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 power of commander in chief is limited to times in which Congress has declared war, and treaties are approved by the senate. Furthermore, Congress does have powers which are explicitly delegated in the constitution. Article I, §8, Cl. 3: The Congress shall have the Power To regulate Commerce with foreign nations[.] Article I, §8, Cl. 5: The Congress shall have the Power To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standards of Weights and Measures[.] Article I, §8, Cl. 10: The Congress shall have the Power To define and punish Piracies and Felonies

committed on the high Seas, and Offences against the Law of Nations[.] Article I, §8, Cl. 11: The Congress shall have the Power to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water[.]

Firstly, it should be noted that in each clause, it very clearly says that “The Congress shall have the power to,” implying a decision and power to be exercised, rather than a duty to be performed. It should further be noted that those powers delegated to Congress relate very directly to relations with foreign nations, such as commerce, foreign coin, war, and offences against the law of nations. While the respondent would argue, that the executive was meant to be a singular body for diplomacy and foreign matters, a textual interpretation of the constitution would find that the president’s power in foreign relations, most notably in recognition, is far from sovereign.

In both extension of the textualist argument and the original intent of the framers, we can further see that it was never intended for such a weighty decision to rest in the hands of a single executive. The framers intended for the legislative branch to be primarily proactive, while the executive and judicial branches remained primarily reactive branches.. This is why the power of declaring war is given to Congress, while the duty of Commander in Chief, to execute the declared war, is given to the president. Similarly, it is the president’s duty, not power, to accept ambassadors in recognition.

There are multiple documents which indicate the framers’ intent. Firstly, in Federalist 69, Alexander Hamilton wrote that, “The President is also to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority.” These words plainly indicate that the president is directed to receive ambassadors, rather than to do so at his discretion. Further credence is given to this argument when entertaining idea of national rebellion or other questionable circumstances. According to St. George Tucker in Blackstone’s Commentaries, the reception of foreign ministers can involve, “questions of delicacy; especially in the recognition of authorities of a doubtful nature. A scruple is said to have been entertained by the president of the United States, as to the reception of the first ambassador from the French republic. But it did not prevent, or retard his reception.” The reception of an ambassador from the French Republic was also an act against the very same French government which had helped the United States through the revolutionary war. While the president may not have personally relished the idea of receiving this ambassador, he fulfilled his duty without delay. This is explained by James Madison, who in Helvidius No. 3. explains that the reception of an ambassador is dependent upon two questions: “Are his credentials from the existing and acting government of his country? Are they properly authenticated?”

Normally, this is a straight-forward matter. In cases in which two governments simultaneously claim the same lands, however, the reception of ambassadors becomes more contentious. Specifically, the reception of an ambassador from one government could be seen as an act of aggression towards its rival. According to William Rawle, “the president, who, not having the constitutional power to declare war, ought ever to abstain from a measure likely to produce it.” In regards to questions of such delicate nature, the president is subordinate to the powers of Congress.

While the powers of the president in abstract are very limited, they become nonexistent in the context of Mr. Zivotofsky’s request and the question: 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 recognition?”

Most of the literature on recognition is based around reception of ambassadors and legitimacy of governments. In the case of *Zivotofsky v. Kerry*, the legitimate government of Israel has been recognized, and the question lies in the recognition of the city of Jerusalem as a part of the State of Israel. While the president’s foreign powers are already limited, in the matter of territory his power is non-existent. This power is in fact delegated to Congress in article I. section VIII. clause X, “The Congress shall have the Power To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations[.] According to Black’s Commentaries, Offences against the Law of Nations are defined as eight general elements and the prosecution of those who might violate them. Among those general elements is, “Honoring of the flag of truce, peace treaties, and boundary treaties.” In the question boundary treaties and agreed upon borders, such as those recognized by the United States surrounding the city of Jerusalem and placing it within Israel, it is the discretion of Congress and Congress alone.

Furthermore, this case does not involve the recognition of an ambassador or foreign minister. While the constitution describes the the powers of Congress in foreign relations in general terms, it explicitly defines the President’s powers and what actions he is to take. In the case of *Zivotofsky v. Kerry*, the president has little power.

Finally, it is the position of the petitioner that Congress holds implied authority in matters of foreign relations while the president has express authority. It is the position of the petitioner that the statute enacted by Congress is constitutional and within the authority of the body which created it. This is supported by the concurring opinion of Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, in which he stated that, “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at

its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” This is the last of three parts in the opinion which describes the executive’s powers in relation to acts of Congress. The first part of this opinion also describes that the president’s power is at its greatest when acting in accordance with congressional acts, which explains the day to day acceptance of ambassadors and little controversy that has surrounded the in the past. When the state of Israel was recognized in 1948, it was after two attempts by Congress to pass resolutions of the same effect, which were dropped due to wartime considerations. When Nixon began the process of recognizing the People’s Republic of China, it was after a series of congressional attempts at reinstating relations and no congressional opposition to his actions. In the presence of congressional opposition and direction, the president’s powers are most limited. Justice Jackson’s opinion, while a concurrence, has subsequently become highly referenced and respected by most scholars and congressman in questions of executive power.

III CONCLUSION

It is the position of the petitioner, Mr. Zivotofsky, that the Statute enacted by Congress, directing 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 constitutional on the grounds that it does not impede presidential recognitions. This argument is based in textualism as well as originalism which define the nature of recognition by the president as a duty to be fulfilled and not a power, and further to be subordinate to the direction of Congress. Further, as the statute does not regard ambassadors or ministers, it is beyond the discretion of the president, and it becomes his duty to enforce it. It is for these reasons that the Petitioner urges the court to decide in favor of Mr. Zivotofsky.