

AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

Zivotofsky v. Kerry, No. 13-628 (2015)

In 2005, Congress included in an appropriations bill a provision that stated the American commitment to identifying Jerusalem as the capital of Israel and requiring that passports for U.S. citizens born in Jerusalem identify their nation of birth as Israel. By contrast, the U.S. Department of State had determined that no identifying nation should be linked to Jerusalem because the status of the city was contested by Israel and Jordan. President George W. Bush had announced that the statutory provision could not be regarded as binding because it would otherwise interfere with the president’s constitutional authority to recognize foreign nations and conduct American diplomacy. That policy was carried forward by the Obama administration.

*Menachem Binyamin Zivotofsky was a U.S. citizen born in Jerusalem, and when his mother applied for a U.S. passport she objected that the State Department did not list Israel as the place of birth. She filed suit against the Secretary of State in federal district court seeking an order directing compliance with the statute. The suit was initially dismissed as raising a nonjusticiable political question, but the U.S. Supreme Court reversed that decision in *Zivotofsky v. Clinton* (2012). When the case was heard on the merits in the District of Columbia Court of Appeals, a three-judge panel unanimously held the statute unconstitutional. On appeal, the U.S. Supreme Court issued a 6-3 decision affirming the circuit court’s decision and agreeing that the statutory provision unconstitutionally infringed on the president’s constitutional responsibilities. Zivotofsky had initially requested that Israel also be listed in a consular report of birth abroad, but that request was subsequently dropped in the litigation (and only Justice Thomas substantively addressed the issue of the consular report).*

JUSTICE KENNEDY delivered the opinion of the Court.

....

Recognition is a “formal acknowledgement” that a particular “entity possesses the qualifications for statehood” or “that a particular regime is the effective government of a state.” . . .

....

Despite the importance of the recognition power in foreign relations, the Constitution does not use the term “recognition,” either in Article II or elsewhere. The Secretary asserts that the President exercises the recognition power based on the Reception Clause, which directs that the President “shall receive Ambassadors and other public Ministers.” . . .

At the time of the founding . . . prominent international scholars suggested that receiving an ambassador was tantamount to recognizing the sovereignty of the sending state. . . . It is a logical and proper inference, then, that the Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations.

This in fact occurred early in the Nation’s history when President Washington recognized the French Revolutionary Government by receiving its ambassador. . . .

The inference that the President exercises the recognition power is further supported by his additional Article II powers. It is for the President “by and with the Advice and Consent of the Senate,” to “make Treaties, provided two thirds of the Senators present concur.” In addition, “he shall nominate, and

by and with the Advice and Consent of the Senate, shall appoint Ambassadors” as well as “other public Ministers and Consuls.”

As a matter of constitutional structure, these additional powers give the President control over recognition decisions. At international law, recognition may be effected by different means, but each means is dependent upon Presidential power. . . .

. . . . The question then becomes whether that power is exclusive. The various ways in which the President may unilaterally effect recognition – and the lack of any similar power vested in Congress – suggest that it is. So, too, do functional considerations. Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not. Foreign countries need to know, before entering into diplomatic relations or commerce with the United States. . . . These assurances cannot be equivocal.

Recognition is a topic on which the Nation must “speak . . . with one voice.” That voice must be the President’s. Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, “[d]ecision, activity, secrecy, and dispatch.” . . .

. . . .

In practice . . . the President’s recognition determination is just one part of a political process that may require Congress to make laws. The President’s exclusive recognition power encompasses the authority to acknowledge, in a formal sense, the legitimacy of other states and governments, including their territorial bounds. Albeit limited, the exclusive recognition power is essential to the conduct of Presidential duties. The formal act of recognition is an executive power that Congress may not qualify. If the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question.

. . . .

In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation’s course. The executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. . . . It is not for the President alone to determine the whole content of the Nation’s foreign policy.

That said, judicial precedent and historical practice teach that it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate, both for the Nation as a whole and for the purpose of making his own position clear. . . . Congress cannot require him to contradict his own statement regarding a determination of formal recognition.

. . . .

. . . . As Zivotofsky argues, certain historical incidents can be interpreted to support the position that recognition is a shared power. But the weight of historical evidence supports the opposite view, which is that the formal determination of recognition is a power to be exercised only by the President.

. . . .

From the first Administration forward, the President has claimed unilateral authority to recognize foreign sovereigns. For the most part, Congress has acquiesced in the Executive’s exercise of the recognition power. On occasion, the President has chosen, as may often be prudent, to consult and coordinate with Congress. As Judge Tatel noted in this case, however, “the most striking thing” about the history of recognition “is what is absent from it: a situation like this one,” where Congress has enacted a statute contrary to the President’s formal and considered statement concerning recognition. *Zivotofsky v. Kerry*, 725 F.3d 197, 221 (D.C. Cir., 2013).

. . . .

If the power over recognition is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in

his and his agent's statements. This conclusion is a matter of both common sense and necessity. . . . [I]f Congress could alter the President's statements on matters of recognition or force him to contradict them, Congress in effect would exercise the recognition power.

As Justice Jackson wrote in *Youngstown Sheet & Tube Co. v. Sawyer* (1952), when a Presidential power is "exclusive," it "disable[s] the Congress from acting upon the subject." . . . This is not to say that Congress may not express its disagreement with the President in myriad ways. For example, it may enact an embargo, decline to confirm an ambassador, or even declare war. But none of these acts would alter the President's recognition decision.

. . . .

Although the statement required by [this statute] would not itself constitute a formal act of recognition, it is a mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State. As a result, it is unconstitutional. This is all the more clear in light of the longstanding treatment of a passport's place-of-birth section as an official executive statement implicating recognition. The Secretary's position on this point has been consistent: He will not place information in the place-of-birth section of a passport that contradicts the President's recognition policy. . . .

..

The flaw in [the statute] is further underscored by the undoubted fact that the purpose of the statute was to infringe on the recognition power – a power the Court now holds is the sole prerogative of the President. . . . [I]t is clear that Congress wanted to express its displeasure with the President's policy by, among other things, commanding the Executive to contradict his own, earlier stated position on Jerusalem. This Congress may not do.

. . . . The Court does not question the power of Congress to enact passport legislation of wide scope. . . .

The problem with [this statute], however, lies in how Congress exercised its authority over passports. It was an improper act for Congress to "aggrandize[e] its power at the expense of another branch." . . .

. . . .

Affirmed.

JUSTICE BREYER, concurring.

I continue to believe that this case presents a political question inappropriate for judicial resolution. But because precedent precludes resolving this case on political question grounds, I join the Court's opinion.

JUSTICE THOMAS, concurring in part and dissenting in part.

Our Constitution allocates the powers of the Federal Government over foreign affairs in two ways. First, it expressly identifies certain foreign affairs powers and vests them in particular branches, either individually or jointly. Second, it vests the residual foreign affairs powers of the Federal Government – i.e., those not specifically enumerated in the Constitution – in the President by way of Article II's Vesting Clause.

[This statute] ignores that constitutional allocation of power insofar as it directs the President, contrary to his wishes, to list "Israel" as the place of birth of Jerusalem-born citizens on their passports. The President has long regulated passports under his residual foreign affairs power, and this portion of [the statute] does not fall within any of Congress' enumerated powers.

By contrast, [the statute] poses no such problem insofar as it regulates consular reports of birth abroad. Unlike passports, these reports were developed to effectuate the naturalization laws, and they continue to serve the role of identifying persons who need not be naturalized to obtain U.S. citizenship.

The regulation of these reports does not fall within the President's foreign affairs powers, but within Congress' enumerated powers under the Naturalization and Necessary and Proper Clauses.

....

Given this pervasive view of executive power [as including the foreign affairs powers of a sovereign state], it is unsurprising that those who ratified the Constitution understood the "executive Power" vested by Article II to include those foreign affairs powers not otherwise allocated in the Constitution. James Iredell, for example, told the North Carolina ratification convention that, under the new Constitution, the President would "regulate all intercourse with foreign powers" and act as the "primary agent" of the United States, though no specific allocation of foreign affairs powers in the document so provided. . . .

Early practice of the founding generation also supports this understanding of the "executive Power." Upon taking office, President Washington assumed the role of chief diplomat. . . . At the same time, he respected Congress' prerogative to declare war, regulate foreign commerce, and appropriate funds.

''''

In the Anglo-American legal tradition, passports have consistently been issued and controlled by the body exercising executive power – in England, by the King; in the colonies, by the Continental Congress; and in the United States, by President Washington and every President since.

....

That the President has the power to regulate passports under his residual foreign affairs powers does not, however, end the matter, for Congress has repeatedly legislated on the subject of passports. These laws have always been narrow in scope. For example, Congress enacted laws prohibiting the issuance of passports to noncitizens. . . . It passed laws regulating the fees that the State Department should impose for issuance of the passports. . . . It also enacted legislation addressing the duration for which passports may remain valid. . . .

....

The argument that [the statute], as applied to passports, could be an exercise of Congress' power to carry into execution its foreign commerce or naturalization powers falters because this aspect of [the statute] is directed at neither of the ends served by those powers. Although at a high level of generality, a passport could be related to foreign commerce and naturalization, that attenuated relationship is insufficient. The law in question must be "directly link[ed]" to the enumerated power. . . . At most, it bears a tertiary relationship to an activity Congress is permitted to regulate: It directs the President's formulation of a document ,which, in turn, may be used to facilitate travel, which, in turn, may facilitate foreign commerce. . . .

....

Although the consular report of birth abroad shares some features with a passport, it is historically associated with naturalization, not foreign affairs. In order to establish a "uniform Rule of Naturalization," Congress must be able to identify the categories of persons who are eligible for naturalization, along with the rules for that process. . . . It has determined that children born abroad to U.S. parents, subject to some exceptions, are natural-born citizens who do not need to go through the naturalization process.

....

[A]lthough registration is no longer required to maintain birthright citizenship, the consular report of birth abroad remains the primary means by which children born abroad may obtain official acknowledgement of their citizenship. Once acknowledged as U.S. citizens, they need not pursue the naturalization process to obtain the rights and privileges of citizenship in this country. Regulation of the report is thus "appropriate" and "plainly adapted" to the exercise of the naturalization power.

By contrast, regulation of the report bears no relationship to the President’s residual foreign affairs power. It has no historical pedigree uniquely associated with the President, contains no communication directed at a foreign power, and is primarily used for domestic purposes. . . .

Because regulation of the consular report of birth abroad is justified as an exercise of Congress’ powers under the Naturalization and Necessary and Proper Clauses and does not fall within the President’s foreign affairs powers, [the statute’s] treatment of that document is constitutional.

....

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins, dissenting.

Today’s decision is a first: Never before has this Court accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs. We have instead stressed that the President’s power reaches “its lowest ebb” when he contravenes the express will of Congress, “for what is at stake is the equilibrium established by our constitutional system.” *Youngstown Sheet & Tube Co. v Sawyer* (1952).

....

The first principles in this area are firmly established. The Constitution allocates some foreign policy powers to the Executive, grants some to the Legislature, and enjoins the President to “take Care that the Laws be faithfully executed.” The Executive may disregard “the expressed or implied will of Congress” only if the Constitution grants him a power “at once so conclusive and preclusive” as to “disable[e] the Congress from acting upon the subject.” *Youngstown*.

Assertions of exclusive and preclusive power leave the Executive “in the least favorable of possible constitutional postures,” and such claims have been “scrutinized with caution” throughout the Court’s history. For our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs. . . .

In this case, the President claims the exclusive and preclusive power to recognize foreign sovereigns. . . . I have grave doubts about that position. The majority places great weight on the Reception Clause. . . . But that provision, framed as an obligation rather than an authorization, appears alongside the *duties* imposed on the President by Article II, Section 3, not the powers granted to him by Article II, Section 2. Indeed, the People ratified the Constitution with Alexander Hamilton’s assurance that the executive reception of ambassadors “is more a matter of dignity than of authority” and “will be without consequence in the administration of the government.” In short, at the time of the founding, “there was no reason to view the reception clause as a source of discretionary authority for the president.”

....

As for history, the majority admits that it too points in both directions. Some Presidents have claimed an exclusive recognition power, but others have expressed uncertainty about whether such preclusive authority exists. Those in the skeptical camp include Andrew Jackson and Abraham Lincoln, leaders not generally known for their cramped conceptions of Presidential power. Congress has also asserted its authority over recognition determinations at numerous points in history. The majority therefore falls short of demonstrating that “Congress has accepted” the President’s exclusive recognition power. In any event, we have held that congressional acquiescence is only “pertinent” when the President acts in the absence of express congressional authorization, not when he asserts power to disregard a statute, as the Executive does here. *Medellin v. Texas* (2008).

....

JUSTICE SCALIA, with whom CHIEF JUSTICE ROBERTS and JUSTICE ALITO join, dissenting.

Before this country declared independence, the law of England entrusted the King with the exclusive care of his kingdom’s foreign affairs. . . . The People of the United States had other ideas when they organized our Government. They considered a sound structure of balanced powers essential to the preservation of just government and international relations formed no exception to that principle.

....
... The Constitution contemplates that the political branches will make policy about the territorial claims of foreign nations the same way they make policy about other international matters. The President will exercise his powers on the basis of his views, Congress its powers on the basis of its views. That is just what has happened here.

....
... Congress's power to "establish an uniform Rule of Naturalization" enables it to grant American citizenship to someone born abroad. The naturalization power also enables Congress to furnish the people it makes citizens with papers verifying their citizenship. . . . Even on the most miserly understanding of Congress's incidental authority, Congress may make grants of citizenship "effectual" by providing for the issuance of certificates authenticating them.

One would think that if Congress may grant Zivotofsky a passport and a birth report, it may also require these papers to record his birthplace as "Israel." The birthplace specification promotes the document's citizenship authenticating function by identifying the bearer, distinguishing people with similar names but different birthplaces from each other. . . . To be sure, recording Zivotofsky's birthplace as "Jerusalem" rather than "Israel" would fulfill these objectives, but when faced with alternative ways to carry its power into execution, Congress has the "discretion" to choose the one it deems "most beneficial to the people." . . .

....
The Court frames this case as a debate about recognition. . . .
The Court holds that the Constitution makes the President alone responsible for recognition and that [this statute] invades this exclusive power. I agree that the Constitution *empowers* the President to extend recognition on behalf of the United States, but I find it a much harder question whether it makes that power exclusive. . . . To take a stark example, Congress legislated in 1934 to grant independence to the Philippines, which were then an American colony. In the course of doing so, Congress directed the President to "recognize the independence of the Philippine Islands as a separate and self-governing nation." . . . Constitutional? And if Congress may control recognition when exercising its power "to dispose of . . . the Territory or other Property belonging to the United States," why not when exercising other enumerated powers? Neither text nor history nor precedent yields a clear answer to these questions. . . .

....
... [This statute] does not require the Secretary to make a formal declaration about Israel's sovereignty over Jerusalem. And nobody suggests that international custom infers acceptance of sovereignty from the birthplace designation on a passport or birth report, as it does from bilateral treaties or exchanges of ambassadors. . . . [M]aking a notation in a passport or birth report does not encumber the Republic with any international obligations. It leaves the Nation free (so far as international law is concerned) to change its mind in the future. That would be true even if the statute required *all* passports to list "Israel" for which the citizen (or his guardian) *requests* "Israel." . . . It is utterly impossible for this deference to private requests to constitute an act that unequivocally manifests an intention to grant recognition.

... Although normal protocol requires specifying the bearer's country of birth in is passport, the State Department will, if the bearer protests, specify the city instead – so that an Irish nationalist may have his birthplace recorded as "Belfast" rather than "United Kingdom." And although normal protocol requires specifying the country with *present* sovereignty over the bearer's place of birth, a special exception allows a bearer born before 1948 in what was then Palestine to have his birthplace listed as "Palestine." [This statute] requires the State Department to make a further accommodation. . . . Granting a request to specify "Israel" rather than "Jerusalem" does not recognize Israel's sovereignty over

Jerusalem, just as granting a request to specify “Belfast” rather than “United Kingdom” does not derecognize the United Kingdom’s sovereignty over Northern Ireland.

....

Even if the Constitution gives the President sole power to extend recognition, it does not give him sole power to make all decisions relating to foreign disputes over sovereignty. To the contrary, a fair reading of Article I allows Congress to decide for itself how its laws should handle these controversies. . .

....

History does not even support an exclusive Presidential power to make what the Court calls “formal statements” about the “legitimacy of a state or government and its territorial bounds.” For a long time, the Houses of Congress have made formal statements announcing their own positions on these issues, again without provoking constitutional objections. . . .

....

The Court’s error could be made more apparent by applying its reasoning to the President’s power “to make Treaties.” There is no question that Congress may, if it wishes, pass laws that openly flout treaties made by the President. Would anyone have dreamt that the President may refuse to carry out such laws . . . so that the Executive may “speak with one voice” about the country’s international obligations? To ask is to answer. Today’s holding puts the implied power to recognize territorial claims . . . on a higher footing than the express power to make treaties. . . .

In the end, the Court’s decision does not rest on text or history or precedent. It instead comes down to “functional considerations” – principally the Court’s perception that the Nation “must speak with one voice” about the status of Jerusalem. The vices of this mode of analysis go beyond mere lack of footing in the Constitution. Functionalism of the sort the Court practices today will *systematically* favor the unitary President over the plural Congress in disputes involving foreign affairs. It is possible that this approach will make for more effective foreign policy, perhaps as effective as that of a monarchy. It is certain that, in the long run, it will erode the structure of separated powers that the People established for the protection of their liberty.

....