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. 07-5347** (D.C. Cir., 2013)

*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. 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. 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.*

HENDERSON, JUDGE.

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Recognition is 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." . . . Recognition is therefore a critical step in establishing diplomatic relations with the United States; if the United States does not recognize a state, it means the United States is "unwilling[] to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control." . . .

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Neither the text of the Constitution nor originalist evidence provides much help in answering the question of the scope of the President's recognition power. In support of his view that the recognition power lies exclusively with the President, the Secretary cites the "receive ambassadors" clause of Article II, Section 3 of the Constitution, which provides, inter alia, that the President "shall receive Ambassadors and other public Ministers." But the fact that the President is empowered to receive ambassadors, by itself, does not resolve whether he has the exclusive authority to recognize foreign nations. . . .

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Beginning with the administration of our first President, George Washington, the Executive has believed that it has the exclusive power to recognize foreign nations.   In 1793, President Washington's cabinet unanimously concluded that Washington need not consult with the Congress before receiving the minister from France's post-revolutionary government, notwithstanding his receiving the minister recognized the new government by implication. . . .

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Zivotofsky marshals several isolated events in support of his position that the recognition power does not repose solely in the Executive but they are unconvincing. First, Zivotofsky argues that in 1898 the Senate passed a joint resolution stating "the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful Government of that Island." But review of the Congressional Record shows that the quoted language was not included in the joint resolution; rather, it was included in a proposed joint resolution in the Senate. And the proposed resolution raised separation-of-powers concerns with many Senators. . . . When the House received the proposed joint resolution, it removed the recognition clause. . . .

Zivotofsky also relies on events that occurred during the administrations of President Andrew Jackson and President Abraham Lincoln. In both instances, however, the Congress did not attempt to exercise the recognition power. Instead, it authorized appropriations to be used by the President to dispatch diplomatic representatives. . . .

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The Supreme Court has more than once declared that the recognition power lies exclusively with the President. *Williams v. Suffolk Insurance Co*. (1839); *United States v. Belmont* (1937). . . . To be sure, the Court has not held that the President exclusively holds the power. But, for us—an inferior court—"carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative," especially if the Supreme Court has repeated the dictum,

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Having reviewed the Constitution's text and structure, Supreme Court precedent and longstanding post-ratification history, we conclude that the President exclusively holds the power to determine whether to recognize a foreign sovereign.

Having concluded that the President exclusively holds the recognition power, we turn to the "passport power," pursuant to which section 214(d) is alleged to have been enacted. We must decide whether the Congress validly exercised its passport power in enacting section 214(d) or whether section 214(d) "impermissibly intrudes" on the President's exclusive recognition power.

. . . . Neither party has made clear the textual source of the passport power in the Constitution, suggesting that it may come from the Congress's power regarding immigration and foreign commerce. . . . Nonetheless, it is clear that the Congress has exercised its legislative power to address the subject of passports. It does not, however, have exclusive control over all passport matters. Rather, the Executive branch has long been involved in exercising the passport power, especially if foreign policy is implicated. *Haig v. Agee* (1981). Until 1856, no passport statute existed and so "the common perception was that the issuance of a passport was committed to the sole discretion of the Executive and that the Executive would exercise this power in the interests of the national security and foreign policy of the United States." After the first passport law was enacted in 1856, "[t]he President and the Secretary of State consistently construed the 1856 Act to preserve their authority to withhold passports on national security and foreign policy grounds." . . .

. . . . [W]hile the Congress has the power to enact passport legislation, its passport power is not exclusive. And if the Congress legislates pursuant to its non-exclusive passport power in such a way to infringe on Executive authority, the legislation presents a separation of powers problem. . . .

. . . . the President's recognition power "is not limited to a determination of the government to be recognized"; it also "includes the power to determine the policy which is to govern the question of recognition." *United States v. Pink* (1942). . . .

With the recognition power overlay, section 214(d) is not, as Zivotofsky asserts, legislation that simply—and neutrally—regulates the form and content of a passport. Instead, as the Secretary explains, it runs headlong into a carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem. . . . We find the Secretary's detailed explanation of the conflict between section 214(d) and Executive recognition policy compelling, especially given "our customary policy to accord deference to the President in matters of foreign affairs." . . . By attempting to alter the State Department's treatment of passport applicants born in Jerusalem, section 214(d) directly contradicts a carefully considered exercise of the Executive branch's recognition power.

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. . . . While the fact that legislation merely touches on a policy relating to recognition does not make it unconstitutional, section 214(d) does not do so; instead the Congress plainly intended to force the State Department to deviate from its decades-long position of neutrality on what nation or government, if any, is sovereign over Jerusalem. Accordingly, we conclude that section 214(d) impermissibly intrudes on the President's recognition power and is therefore unconstitutional.

. . . . *Dismissed*.

CIRCUIT JUDGE TATEL, CONCURRING.

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It is beyond dispute that Congress's immigration, foreign commerce, and naturalization powers authorize it to regulate passports. . . . [Zivotofsky’s] argument, however, overlooks the independent limitations the Constitution imposes even on legislation within Congress's enumerated powers. That is, a statute that Congress would otherwise have authority to enact may still run up against some independent restriction on its power. . . .

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. . . . All told, given the great weight of historical and legal precedent and given that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative," we are compelled to conclude that "[p]olitical recognition is exclusively a function of the Executive.” . . .

The critical question, then, is whether Section 214(d) in fact infringes on the President's exclusive authority to recognize foreign sovereigns. . . .

What makes this case difficult is that Zivotofsky is partly right. As the Secretary concedes, a primary purpose of the place-of-birth field is to enable the government to identify particular individuals—e.g., by distinguishing one Jane Doe from another born the very same day. And the fact that the Secretary permits individuals to choose to list a city or area of birth instead of a country of birth does tend to suggest that its place-of-birth policy is also about personal identity.

That the Secretary's policy is about identification and personal identity, however, does not mean that it does not also implicate recognition. In fact, it clearly does. Over the years, the Secretary has been incredibly consistent on this point: in no circumstances—including circumstances beyond the Jerusalem issue—can an individual opt for a place-of-birth designation inconsistent with United States recognition policy. . . .

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So in the end, this is a separation-of-powers dispute in which both branches involved in the struggle actually agree. Congress intended Section 214(d) to alter recognition policy with respect to Jerusalem, and the President sees it the same way. Our decision makes us the third and final branch to reach this conclusion. And because the recognition power belongs exclusively to the President, that means Section 214(d) is unconstitutional.

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