



AMERICAN CONSTITUTIONALISM
 VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 10: The Reagan Era – Separation of Powers

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*Timothy Flanigan, Issuance of Official or Diplomatic Passports (1992)*¹

In 1991, Senator Frank Lautenberg (NJ, Democrat) introduced the Anti-Boycott Passport Act into Congress. The Arab states in the Middle East had long refused to accept passports that indicated that the bearer of the passport had traveled in Israel, thus excluding those with Israeli-stamped passports from entering an Arab country. In response, the United States had traditionally issued two passports to those traveling in the Middle East: one to present for travel to Israel and one to present for travel to the Arab states and other parts of the world. The Anti-Boycott bill was designed to help legitimate the status of Israel in the Middle East by requiring that the Department of State cease issuing “Israel-only” passports and instead issue only one passport to American citizens, which would necessarily bear all the stamps of any nation that the individual visited.

The bill was incorporated into the 1991 appropriations act that funded the State Department, along with several other executive departments and agencies. At the appropriations hearings, Secretary of State James Baker informed the Senate that the administration supported efforts to end the Arab boycott of Israel (and had adopted regulations aimed at minimizing Israel-only passports) but would have constitutional objections to a provision that prohibited issuing multiple passports. President H. W. Bush indicated in a signing statement that the secretary of state should administer the provision such that it did not interfere with the constitutional prerogatives of the president and separately instructed Baker to issue the type and number of passports to diplomats that their work required. Near the end of the Bush administration, the State Department requested an opinion from the Office of Legal Counsel in the Justice Department on the constitutionality of the one-passport legislative requirement. Acting Assistant Attorney General Timothy Flanigan concluded that these requirements unconstitutionally interfered with presidential powers and responsibilities and should not be implemented. The provision was not included in subsequent statutes.

How far does the presidential power over foreign policy and diplomacy extend? What can Congress do to direct diplomatic efforts? How much authority does Congress have to regulate the issuance of passports? Could the president refuse to comply with a law that specified that all relevant government documents must identify Jerusalem as the capital of Israel? Is the president obliged to implement passport restrictions even if he thinks they are unconstitutional?

....

The necessary background for our analysis of the particular issues presented here is the well-settled recognition of the President’s broad authority over the Nation’s foreign affairs. That authority flows from his position as head of the unitary Executive and as Commander-in-Chief. See, e.g., U.S. Constitution, Art. II, sec. 1-3; *Haig v. Agee* (1981); *United States v. Curtiss-Wright Export Corp.* (1936). In addition, section 2 of Article II of the Constitution specifically grants the President the “Power . . . to make Treaties” and to “appoint Ambassadors, other public Ministers and Consuls.” These constitutional provisions authorize the President to determine the form and manner in which the United States will maintain relations with foreign nations and to direct the negotiation of treaties and agreements with them. . . .

In exercising the “federal power over external affairs,” the President is not subject to the interference of Congress. . . .

¹ Excerpt taken from “Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports,” 16 Op. Off. Legal Counsel 18 (1992).



The President himself emphasized these principles in [a] signing statement . . . :

Article II of the Constitution confers the Executive power of the United States on the President alone. Executive power includes the authority to receive and appoint ambassadors and to conduct diplomacy. Thus, under our system of government, all decisions concerning the conduct of negotiations with foreign governments are within the exclusive control of the President. . .

. . . .

From the Executive's plenary authority to conduct the Nation's foreign affairs flow a number of specific executive powers that are of particular relevance to the issue at hand. These include control over the issuance of passports, power to determine the content of communications with foreign governments, authority to conduct diplomacy, and authority to define the content of foreign policy. . . .

First, [this statute] conflict[s] with the long-accepted principle that the President, through delegates of his choosing, has authority over issuance of passports for reasons of foreign policy or national security. Prior to the enactment of the first passport legislation, it has generally understood that the

issuance of a passport was committed to the sole discretion of the Executive and the Executive would exercise this power in the interests of the national security and foreign policy of the United States. This derived from the generally accepted view that foreign policy was the province and responsibility of the Executive. *Haig v. Agee* (1981).

. . . . From the earliest passport statutes, Congress expressly recognized the Executive's authority in this regard. . . . Passport legislation enacted in 1856, which authorized the Secretary of State to grant and issue passports "under such rules as the President shall designate and prescribe," reinforced the established power of the Executive in this area. . . .

. . . .

[This statute] would interfere with the President's communications to foreign governments in the conduct of the business of the United States Government abroad. In interfering with the issuance of official and diplomatic passports, Congress infringes on the President's plenary authority "to speak or listen as the representative of the nation." *United States v. Curtiss-Wright Export Corp.* (1936).

In general, passports are representations by the President to a foreign government on behalf of the United States

More particularly, official and diplomatic passports are documents addressed to foreign powers in which the President vouches for United States officials and diplomats. . . .

Because of the communicative nature of official and diplomatic passports, [this statute] may be read as an attempt to dictate to the President the scope of permissible communications with foreign governments by means of passports. . . . Indeed, in certain cases, the single-passport requirement might positively compel the President to issue, on behalf of government officials and diplomats, letters of introduction that would offend the recipients and cause the bearers to be turned away or subjected to retaliation and harassment. For example, the State Department predicts that "U.S. officials travelling to the Middle East could be expected to face obstacles to their entry to many Arab League countries if their passports reflect travel to Israel." . . .

Third, the single-passport requirement would impair the President's ability to conduct foreign affairs by denying his diplomats the documentation necessary for entry into certain Arab League nations. It has long been recognized that "[a]s 'sole organ' [of the federal government in the field of international relations], the President determines also how, when, where and by whom the United States should make or receive communications, and there is nothing to suggest that he is limited as to time, place, form, or forum." Louis Henkin, *Foreign Affairs and the Constitution* (1972). [This statute] impermissibly attempt[s] to limit the President's authority to make such determinations.

. . . .



It is clear that the single-passport requirement would interfere with, and perhaps foreclose altogether, the President's ability to conduct diplomacy involving certain Arab League countries. . . .

. . . . State Department officials have predicted that - at the very least - the single-passport requirement is likely to result in "incidents of reciprocation, retaliation and harassment of both officials and Congressmen, . . . either as a matter of policy in certain countries or simply as a manifestation of anti-Israeli zealotry among airport officials." . . . Such difficulties would clearly "interfere with the ability of United States officials to engage in diplomacy and could upset delicate and complex negotiations" and "would place our officials at personal risk." . . .

. . . . To the extent that a single-passport requirement is an attempt, by indirect means, to dictate the substance of United States policy toward Arab League governments, it suffers from an additional constitutional defect. As the "sole organ of the nation in its external relations," . . . it is for the President alone to articulate the content of the Nation's response to the Arab League passport policy. By interfering with the President's foreign policy determinations, [this statute] attempt[s] to intrude into a sphere in which the Constitution gives Congress no role.

In sum, the single-passport requirement interferes with the "plenary and exclusive" power of the President to conduct foreign affairs . . . [and to that extent does] not comport with the Constitution.

. . . .
The final issue we address is whether the President may refuse to enforce the single-passport requirements. The Department of Justice has consistently advised that the Constitution provides the President with the authority to refuse to enforce unconstitutional provisions. . . .

Among the laws that the President must "take Care" to faithfully execute is the Constitution. This proposition seems obvious, since the Constitution is "the supreme Law of the Land." . . .

. . . . An unconstitutional statute, as Chief Justice Marshall explained in his archetypal decision, is simply not a law at all. . . .

The President's constitutional oath of office is further authority for the President to refuse to enforce an unconstitutional law. The Constitution requires the President to take an oath in which he promises to "preserve, protect and defend the Constitution of the United States." . . .

. . . .
[T]he Department of Justice, under both Democratic and Republican Administrations, has consistently advised that the Constitution authorizes the President to refuse to enforce a law that he believes is unconstitutional. . . .

. . . .
We reject . . . the argument that the President may not treat a statute as invalid prior to a judicial determination, but rather must presume it to be constitutional. This would subtly transform the proposition established in *Marbury v. Madison* (1803) . . . to the fundamentally different proposition that a statute conflicts with the Constitution *only* when the courts declare so. . . .

. . . . Although we recognize that the veto power is the primary tool available to the President; we disagree with the content that the framers intended it to be the only tool at the President's disposal. . . . The Constitution limits the President's formal power in the legislative process to the exercise of a qualified veto, but it places no limit on his authority to take care that the laws are faithfully executed.

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