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SCOTUS Summary: Separation of Powers in Zivotofsky v. Kerry

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Script for Summary of Court's Decision in *Zivotofsky v. Kerry*

Welcome to Supreme Podcast, and the summary of the decision of the Supreme Court in *Zivotofsky v. Kerry*.

This is a Separation of Powers case involving a dispute between the President and Congress over the recognition of a foreign country, in this case the power of the President to determine which foreign government, if any, has territorial sovereignty over the City of Jerusalem. By a vote of 6-3 the Supreme Court upheld the President's exclusive and conclusive authority to make that determination.

The Facts

Both Israel and Palestine assert jurisdiction over Jerusalem. As a consequence, the United States has followed a longstanding policy of not taking a position regarding whether Jerusalem is a part of Israel. However, in 2002 Congress enacted the Foreign Relations Authorization Act. Section 214 of that statute is entitled "United States Policy With Respect to Jerusalem as the Capital of Israel." In Section 214(d) of the Act Congress ordered the State Department to designate "Israel" as the country of birth for U.S. citizens born in Jerusalem at the request of the citizen or his guardian.

In 2002 Menachem Binyamin Zivotofsky was born in Jerusalem to American parents. His parents applied to the State Department for a passport for him and requested that it show his place of birth as "Israel." In keeping with its longstanding policy the State Department instead listed his place of birth as "Jerusalem." His parents brought this suit on his behalf requesting the courts to order the Justice Department to state on his passport that he was born in Israel.

***Zivotofsky v. Clinton* – The Political Question Ruling**

In 2012 the Supreme Court was asked to rule whether this dispute was justiciable – that is, whether it presented a legal question that can be determined by the courts or a political question that can be resolved only by resort to the political process – legislation or executive action. In *Zivotofsky v. Clinton* (2012), by a vote of 8-1, the Supreme Court ruled that this case did *not* present a political question. The Court found that the issue to be determined was simply the constitutionality of Section 214(d), and that under *Marbury v. Madison* the courts have the power and the duty to determine the constitutionality of statutes. The Supreme Court remanded the case to the lower courts for a determination whether Congress had the authority to enact Section 214(d) under its power to provide for the contents of passports, and whether this statute unconstitutionally interferes with the power of the President to recognize foreign governments.

The Supreme Court's majority opinion was authored by Chief Justice Roberts. The lone dissenter was Justice Breyer, who contended that this matter presented a political question that the courts were powerless to address. In that case Justice Breyer advised the plaintiff to seek redress from the political branches, not from the courts, and expressed confidence that "the ability of the political branches to work out their differences minimizes the need for judicial intervention here." Justice Breyer added that a ruling by the courts on this issue would "bring about

‘embarrassment,’ [and] show lack of ‘respect’” for the other branches of government, and would “potentially disrupt sound foreign policy decisionmaking.”

Zivotofsky on Remand

On remand the Court of Appeals struck down Section 214(d) as unconstitutional under the doctrine of Separation of Powers. The Appeals Court determined that “the President exclusively holds the power to determine whether to recognize a foreign sovereign,” and that “section 214(d) directly contradicts a carefully considered exercise of the Executive branch’s recognition power.”

The Positions and Opinions of the Justices in *Zivotofsky v. Kerry*

The Supreme Court affirmed the decision of the Court of Appeals. This time Justice Kennedy authored the opinion for the majority of the Court. He was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Breyer filed a concurring opinion, and Justice Thomas filed an opinion concurring in the judgment in part and dissenting in part. Chief Justice Roberts and Justice Scalia each authored dissenting opinions in which they were joined by Justice Alito.

Justice Kennedy’s Majority Opinion

The majority opinion invokes all the principal sources of constitutional authority – the text of the Constitution, the intent of the framers, judicial precedent, longstanding tradition, and arguments based upon the purpose and policy of the doctrine of Separation of Powers. The Court comes to an unequivocal conclusion – that the President alone has the power to recognize whether certain territory belongs to a particular country.

A critical facet of Justice Kennedy’s opinion is that he begins his opinion by citing and quoting at length from Justice Robert Jackson’s concurring opinion in *Youngstown Sheet & Tube v. Sawyer*. Justice Jackson’s “famous tripartite framework,” as Justice Kennedy describes it, identifies three situations involving the interaction of the President and Congress: where Congress has authorized the President’s actions; where Congress has remained silent in the face of Presidential action; and where Congress has expressly prohibited the President from acting. This case obviously falls into the third category – the President and Congress are at loggerheads. The standard that Justice Jackson proposed to govern situations in the third category is a simple one: does the Constitution vest the President and the President alone with the power to make the determination. As Justice Kennedy states, “To succeed in this third category, the President’s asserted power must be both “exclusive” and “conclusive” on the issue.”

Justice Jackson proposed this standard for resolving conflicts between Congress and the President more than 60 years ago. This approach requires the Court to consider the practical consequences of their Separation of Powers decisions. Rather than looking strictly to the text of the Constitution, with its inexact terminology such as “legislative,” “executive,” and “judicial” power, the Jackson test necessarily requires the court to maintain an efficient and effective balance of power among the branches of government. In short, it demands a sensitive and perceptive policy analysis. Justice Kennedy quoted Jackson’s words throughout his opinion.

Perhaps this is why Justice Thomas does not even mention the *Youngstown* case, and why Justice Scalia mentions it only once, in passing.

Text of the Constitution

The principal language in the Constitution that vests the President with the power to recognize foreign countries and to determine their territorial bounds is the Reception Clause: Article II, Section 3, which provides that the President shall “shall receive Ambassadors and other public Ministers.” This means, according to Justice Kennedy, that the Constitution gives the President the power to determine what countries are recognized by the United States. If the President refuses to “receive” an ambassador, then that is equivalent to a denial of recognition ... a power that the Constitution gives to the President and the President alone.

Justice Kennedy found additional support in the Constitution for this position in the fact that the President alone has the power to negotiate treaties and to nominate and appoint ambassadors. It is true that the Senate must ratify treaties to give them the force of law, and that the Senate must confirm an ambassador before the President can appoint that person to the post – but it is also true that Congress has no power whatsoever to negotiate treaties or appoint ambassadors. The power to deal directly with foreign countries is vested by the Constitution in the President alone.

The Intent of the Framers

Justice Kennedy found that the framers shared this understanding of the Reception Clause. He stated that several “prominent international scholars” of the 18th century agreed that “receiving an ambassador was tantamount to recognizing the sovereignty of the sending state.” While Hamilton initially saw the Reception of ambassadors as merely a formality, after President Washington received the ambassador from the French revolutionary government he changed his mind, concluding that it was tantamount to recognition. Joseph Story, writing in 1833, agreed.

Judicial Precedent

The bulk of Justice Kennedy’s opinion reviews the Supreme Court’s previous statements about the recognition power. I say “statements” because although the Court has many times expressed its views about the relative power of the Congress and the President to recognize other countries, the Court had never issued a definitive ruling regarding the allocation of that power. Justice Kennedy explains why this is the first case to do so:

In part that is because, until today, the political branches have resolved their disputes over questions of recognition.

In reviewing these cases, Justice Kennedy concludes:

a fair reading of the cases shows that the President’s role in the recognition

process is both central and exclusive.

These cases included disputes over President Van Buren's power to recognize sovereignty over the Falkland Islands; President Roosevelt's recognition of the U.S.S.R.; the President's power to recognize the Cuban government; and the recognition of the Republic of China.

The strongest statement regarding the power of the President to deal with foreign countries appeared in the case of *United States v. Curtiss-Wright Corp.*, where the Court stated:

"In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' [10 Annals of Cong.] 613. "*Id.*, at 319.

While the Senate ratifies treaties and Congress makes laws regarding foreign commerce, Justice Kennedy cited both precedent and tradition as support for the policy argument that he would ultimately rely upon:

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 within the context of recognition in discussions and negotiations with foreign nations. Recognition is an act with immediate and powerful significance for international relations, so the President's position must be clear. Congress cannot require him to contradict his own statement regarding a determination of formal recognition.

Longstanding American Traditions

What were those traditions? Justice Kennedy reviewed the actions of many Presidents – Washington, Monroe, Jackson, Lincoln, McKinley, and Carter – in their recognition of foreign countries. In some instances (notably Jackson and Lincoln) the President sought the support of Congress before taking the step of recognizing other countries; but in no instance did a President take the position that this was a legislative act. Kennedy concluded:

This history confirms the Court's conclusion in the instant case that the power to recognize or decline to recognize a foreign state and its territorial bounds resides in the President alone. For the most part, Congress has respected the Executive's policies and positions as to formal recognition. At times, Congress itself has

defended the President's constitutional prerogative. Over the last 100 years, there has been scarcely any debate over the President's power to recognize foreign states. In this respect the Legislature, in the narrow context of recognition, on balance has acknowledged the importance of speaking "with one voice." The weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency

Policy Considerations

Having laid the foundation of his decision in constitutional text, the framers' intent, voluminous judicial authority, and longstanding governmental practice, in the final portion of his opinion Justice Kennedy drew several conclusions about what the consequences of ruling against the President would entail.

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. ...

If Congress may not pass a law, speaking in its own voice, that effects formal recognition, then it follows that it may not force the President himself to contradict his earlier statement. ...

The flaw in § 214(d) is further underscored by the undoubted fact that 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. The statute is titled "United States Policy with Respect to Jerusalem as the Capital of Israel." The House Conference Report proclaimed that § 214 "contains four provisions related to the recognition of Jerusalem as Israel's capital." And, indeed, observers interpreted § 214 as altering United States policy regarding Jerusalem—which led to protests across the region. From the face of § 214, from the legislative history, and from its reception, it 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.

In the end, Justice Kennedy concluded, Congress may not use its power to determine the content of passports to thwart the President's authority to recognize other countries.

The problem with § 214(d), however, lies in how Congress exercised its authority over passports. It was an improper act for Congress to "aggrandiz[e] its power at the expense of another branch" by requiring the President to contradict an earlier recognition determination in an official document issued by the Executive Branch.

Justice Breyer's Concurring Opinion

Justice Breyer stated that he still believed that this matter involves a political question but that in reaching the merits he agreed with the majority opinion that the recognition power is vested in the President alone.

Justice Thomas' Opinion Concurring in the Judgment in Part and Dissenting in Part

Justice Thomas split the issue facing the Court into two questions: may Congress require the State Department to issue passports that recognize Jerusalem as part of Israel with respect to the place of birth, and may Congress require that a consular report of birth abroad reflect that fact. Justice Thomas agreed with the majority's conclusion that Section 214(d) was unconstitutional, but he arrived at that conclusion by following a different path of reasoning. He found simply that Congress has no power to regulate the content of passports. There is no enumerated power granting Congress the power over passports, and the Necessary and Proper Clause, in his view, vests power in Congress to regulate only those matters within the purview of the enumerated powers. Historically, he noted, the power to issue passports rests with the Executive Branch. He stated:

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.

The power over passports, he concluded, is a residual power of the President. Section 214(d) was unconstitutional as applied to passports because Congress lacked the power to regulate them. Justice Thomas would have upheld the constitutionality of Section 214(d) as applied to another type of official document, consular reports regarding birth abroad. These reports are used to determine citizenship, a subject that Congress has ample authority to regulate under the Naturalization Clause. Justice Thomas would have ruled that Congress has the power to control the content of these consular reports.

Chief Justice Roberts' Dissenting Opinion

In dissent, Chief Justice Roberts emphasized that this was the first case in which the Court had ruled that the President had the power to contravene the express terms of a law dealing with foreign policy – and in his opinion this was unnecessary. The Chief Justice accepted the Jackson “tripartite” framework, but unlike the majority he was skeptical that the President alone has the power to recognize foreign countries. But he found it unnecessary to decide this case on constitutional grounds, because in his opinion Section 214(d) was not a formal act of recognizing Israel's sovereignty over Jerusalem, but merely a provision making identification of the individual more accurate. It was an exercise of the passport power, not the recognition power.

Justice Scalia's Dissenting Opinion

At the beginning of his opinion, Justice Scalia took the position that Congress and the President have shared authority in disputes over the territorial claims of foreign nations:

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.

Justice Scalia characterized the notion that the President alone has the power to make such determinations as a “royal prerogative” – something the framers most certainly did not approve of. Accordingly Justice Scalia, at least in some portions of his opinion, would have split the recognition power between the President and Congress.

However, at another point in his opinion Justice Scalia expressed a point of view close to that of Chief Justice Roberts – that even though the President might have the exclusive power to determine matters of territorial sovereignty of foreign nations, this case was not a matter of recognition of a foreign country but rather the identity of an American citizen. He stated:

In the final analysis, the Constitution may well deny Congress power to recognize—the power to make an international commitment accepting a foreign entity as a state, a regime as its government, a place as a part of its territory, and so on. But whatever else § 214(d) may do, it plainly does not make (or require the President to make) a commitment accepting Israel’s sovereignty over Jerusalem.

Instead, Justice Scalia comes to the same conclusion as Justice Roberts – that Section 214(d) is concerned not with international relations but with personal identity:

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, helping authorities uncover identity fraud, and facilitating retrieval of the Government’s citizenship records. To be sure, recording Zivotovsky’s birthplace as “Jerusalem” rather than “Israel” would fulfill these objectives, but when faced with alternative ways to carry its powers into execution, Congress has the “discretion” to choose the one it deems “most beneficial to the people.” It thus has the right to decide that recording birthplaces as “Israel” makes for better foreign policy. Or that regardless of international politics, a passport or birth report should respect its bearer’s conscientious belief that Jerusalem belongs to Israel.

The *Zivotofsky* case establishes the recognition power as belonging solely to the President – it disables Congress from forcing the Executive Branch to make statements that conflict with the President’s foreign policy as to recognition – and it confirms the primacy of Justice Jackson’s tripartite, policy-based approach to Separation of Powers cases.

This is Wilson Huhn reporting for Supreme Podcast.