CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

EDITED BY JOHN R. CROOK

In this section:

https://doi.org/10.5305/amerjintelaw.106.3.0643 Published online by Cambridge University Press

GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

U.S. Supreme Court Rules Statute Directing State Department to Record Jerusalem-Born Citizen's Birthplace as "Israel" Does Not Raise Political Question

In March 2012, the U.S. Supreme Court ruled by a vote of 8-1 in *Zivotofsky v. Clinton* to reverse the D.C. Circuit's dismissal of a suit[1] seeking to compel the secretary of state to record the place of birth of a U.S. citizen born in Jerusalem as "Israel."[2] The Court remanded the case for further proceedings to determine if the statute directing such registration when requested is constitutional.[3]

Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003—entitled "United States Policy with Respect to Jerusalem as the Capital of Israel"—states in part that "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."[4] President George W. Bush signed the law but included a signing statement noting that it "impermissibly interfere[s] with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch."[5]

The Department of State did not implement the statute, viewing the status of Jerusalem to be a matter to be resolved by through negotiations and not through unilateral U.S. action. Menachem Zivotofsky was born to U.S. citizen parents in Jerusalem in 2002. His parents sought to have his passport and consular record of birth reflect his place of birth as Israel and sued when their request was refused. After extensive litigation, the U.S. Court of Appeals for the D.C. Circuit upheld a lower court decision dismissing their claim, holding that the status of Jerusalem posed a nonjusticiable political question not suitable for resolution by U.S. courts.[6]

In an opinion by Chief Justice John Roberts, the Supreme Court disagreed, holding that "[t]he courts are fully capable of determining whether this statute may be given effect, or instead must be struck down in light of authority conferred on the Executive by the Constitution."[7] The Court accordingly remanded the case for further proceedings to determine whether the statute posed an unconstitutional interference by Congress with the president's responsibilities for U.S. foreign affairs. An excerpt from the Court's opinion follows:

> The lower courts ruled that this case involves a political question because deciding Zivotofsky's claim would force the Judicial Branch to interfere with the President's exercise of constitutional power committed to him alone. The District Court understood

[1] John R. Crook, Contemporary Practice of the United States, 104 AJIL 271, 278 (2010).

[2] Zivotofsky v. Clinton, 132 S.Ct. 1421, 1425–26 (2012).

[3] *Id.* at 1430–31; *see also* Adam Liptak, *Dispute over Jerusalem Engages Court*, N.Y. TIMES, Nov. 8, 2011, at A13; Robert Barnes, *Justices Find a Pile of Issues in Passport Case*, WASH. POST, Nov. 8, 2011, at A2; Editorial, *A President's Prerogative*, WASH. POST, Nov. 10, 2011, at A24; John M. Cushman Jr., *Justices Decline to Say if Jerusalem-Born Americans Can Claim Israeli Birthplace*, N.Y. TIMES, Mar. 27, 2012, at A15; *Courts Can Decide Issue of Israel as Birthplace*, WASH. POST, Mar. 27, 2012, at A6.

[4] 2 Pub. L. No. 107-228 (2002), 116 Stat. 1350 (codified at 22 U.S.C. §2651 note (2006)).

[5] President George W. Bush, Statement on Signing the Foreign Relations Authorization Act, 38 WEEKLY COMP. PRES. DOC. 1659 (Sept. 30, 2002).

[6] Zivotofsky v. Clinton, 571 F.3d 1227, 1233 (D.C. Cir. 2009).

[7] *Zivotofsky*, 132 S.Ct. at 1425.

Zivotofsky to ask the courts to "decide the political status of Jerusalem." 511 F.Supp.2d, at 103. This misunderstands the issue presented. Zivotofsky does not ask the courts to determine whether Jerusalem is the capital of Israel. He instead seeks to determine whether he may vindicate his statutory right, under §214(d), to choose to have Israel recorded on his passport as his place of birth.

For its part, the D.C. Circuit treated the two questions as one and the same. That court concluded that "[o]nly the Executive—not Congress and not the courts—has the power to define U.S. policy regarding Israel's sovereignty over Jerusalem," and also to "decide how best to implement that policy." 571 F.3d, at 1232. Because the Department's passport rule was adopted to implement the President's "exclusive and unreviewable constitutional power to keep the United States out of the debate over the status of Jerusalem," the validity of that rule was itself a "nonjusticiable political question" that "the Constitution leaves to the Executive alone." *Id.*, at 1231–1233. Indeed, the D.C. Circuit's opinion does not even mention §214(d) until the fifth of its six paragraphs of analysis, and then only to dismiss it as irrelevant: "That Congress took a position on the status of Jerusalem and gave Zivotofsky a statutory cause of action . . . is of no moment to whether the judiciary has [the] authority to resolve this dispute. . . ." *Id.*, at 1233.

The existence of a statutory right, however, is certainly relevant to the Judiciary's power to decide Zivotofsky's claim. The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.

Moreover, because the parties do not dispute the interpretation of §214(d), the only real question for the courts is whether the statute is constitutional. At least since *Marbury* v. *Madison*, 5 U.S. 137 (1803), we have recognized that when an Act of Congress is alleged to conflict with the Constitution, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.*, at 177. That duty will sometimes involve the "[r]esolution of litigation challenging the constitutional authority of one of the three branches," but courts cannot avoid their responsibility merely "because the issues have political implications." *INS* v. *Chadha*, 462 U.S. 919, 943 (1983).

In this case, determining the constitutionality of §214(d) involves deciding whether the statute impermissibly intrudes upon Presidential powers under the Constitution. If so, the law must be invalidated and Zivotofsky's case should be dismissed for failure to state a claim. If, on the other hand, the statute does not trench on the President's powers, then the Secretary must be ordered to issue Zivotofsky a passport that complies with §214(d). Either way, the political question doctrine is not implicated. "No policy underlying the political question doctrine suggests that Congress or the Executive . . . can decide the constitutionality of a statute; that is a decision for the courts." *Id.*, at 941–942.

The Secretary contends that "there is 'a textually demonstrable constitutional commitment'" to the President of the sole power to recognize foreign sovereigns and, as a corollary, to determine whether an American born in Jerusalem may choose to have Israel listed as his place of birth on his passport. *Nixon*, 506 U.S., at 228 (quoting *Baker*, 369 U.S., at 217); see Brief for Respondent 49–50. Perhaps. But there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute. The Judicial Branch appropriately exercises that authority, including in a case such as this,

where the question is whether Congress or the Executive is "aggrandizing its power at the expense of another branch."[8]

Justice Sonia Sotomayor, joined in part by Justice Stephen Breyer, wrote a separate concurring opinion calling for a more demanding analysis of the political question issue. Justice Samuel Alito's separate concurrence saw the issue in the case as very narrow: "whether the statutory provision at issue infringes the power of the President to regulate the contents of a passport."[9] Justice Breyer dissented, believing that the Court of Appeals was correct in dismissing the case on political question grounds.[10]

Ninth Circuit Revisits Armenian Genocide Legislation en Banc, Finds Preemption

In another chapter in the saga[1] of a California statute intended to permit suits against European insurance companies by descendants of Armenian genocide victims, the U.S. Court of Appeals for the Ninth Circuit ruled in February 2012 that the statute intruded upon federal responsibility for foreign affairs and was constitutionally preempted.[2] Judge Susan Graber's opinion for the court summarizes the background.

> Section 354.4 of the California Code of Civil Procedure vests California courts with jurisdiction over certain insurance claims brought by "Armenian Genocide victim[s]" and extends the statute of limitations for such claims. Under that statute, individual Plaintiffs, including Vazken Movsesian, filed this class action against various insurers. One of the defendant insurance companies filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss the claims, arguing, among other things, that section 354.4 is preempted under the foreign affairs doctrine. *See* U.S. Const. art. VI, cl. 2 (Supremacy Clause) ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). We hold that section 354.4 is preempted and, accordingly, reverse the district court's contrary ruling.[3]

Excerpts from the court's opinion follow:

> The Constitution gives the federal government the exclusive authority to administer foreign affairs. . . .
>
> Under the foreign affairs doctrine, state laws that intrude on this exclusively federal power are preempted. . . .
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> Foreign affairs preemption encompasses two related, but distinct, doctrines: conflict preemption and field preemption. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 418–20 (2003). Under conflict preemption, a state law must yield when it conflicts with an express federal foreign policy. *See id.* at 421 ("The exercise of the federal executive authority means that state law must give way where, as here, there is evidence of clear conflict between the

[8] *Id.* at 1427–28 (citation omitted).
[9] *Id.* at 1436 (Alito, J., concurring).
[10] *Id.* at 1441 (Breyer, J., dissenting).
[1] John R. Crook, Contemporary Practice of the United States, 105 AJIL 333, 334 (2011).
[2] Movesian v. Victoria Versicherung AG, 670 F.3d 1067, 1077 (9th Cir. 2012).
[3] *Id.* at 1069–70.