

THE POWERS OF CONGRESS AND THE PRESIDENT ON MATTERS THAT AFFECT U.S. FOREIGN AFFAIRS

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I. INTRODUCTION

The subject of this Panel¹ is the authority of Congress and the President on matters that affect foreign affairs, when they disagree. The question arose in a case argued in the Supreme Court last term, *Zivotofsky v. Clinton*.² Under U.S. law, Consulates in foreign countries are required to issue a U.S. passport and Consular Report of Birth Abroad (CRBA) for children born abroad to parents who are U.S. citizens.³

Generally, those documents list the country of birth. However, for children born in Jerusalem, the State Department manual instructs

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1. A version of this paper was presented on October 26, 2012, at a Panel on Legislative and Executive Authority when Congress & the President Disagree on Matters that May Affect Foreign Affairs: *Clinton v. Zivotofsky*, at International Law Weekend, held in New York City, October 25–27, 2012. The four members of the Panel were Bill Dodge, who served as Counselor on International Law while the case was in the Supreme Court, and is a professor at the University of California, Hastings College of Law; Paul Stephan, who served as Counselor during 2006–07 and is a professor at the University of Virginia Law School, Nathan Lewin, who has represented the petitioners in this case pro bono since the inception of the case, in September of 2003, and continues to do so, and the author.

2. *Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012).

3. 22 C.F.R. § 50.2.

Consulates to enter “Jerusalem,” rather than Israel, as the place of birth.⁴ In 2002, Congress adopted a law requiring the Consulate to enter “Israel” for children born in Jerusalem, if the parents so request.⁵

The *Zivotofsky* case involves an action by U.S. parents of a child born in Jerusalem whose request that the passport and Consular Report of Birth Abroad list Israel as the place of birth was refused by the U.S. Consul.⁶ The Court of Appeals for the D.C. Circuit ordered the action dismissed.⁷ Two judges did so on the ground that it raised a political question.⁸ One judge did not agree that it was a political question, but concurred on the ground that the legislation unconstitutionally infringed on the President’s power to recognize foreign sovereigns.⁹

The Supreme Court granted *certiorari*.¹⁰ Moreover, even though the petition for *certiorari* raised only the political question issue, the Court directed the parties to also address whether the statute “impermissibly infringes the President’s power to recognize foreign sovereigns.”¹¹

The case was argued in the Supreme Court on November 7, 2011.¹² Most of the questions by the Justices focused on the constitutional authority of Congress to adopt the legislation. The Court did not decide that question, however. It held eight to one that it was not a political question,¹³ but remanded the case to the lower court for a decision on the question it had asked the parties to address, stating:

Because the District Court and the D.C. Circuit believed that review was barred by the political question doctrine, we are

4. Dept. of State, 7 Foreign Affairs Manual § 1360, Exh. 1383.1, App. 127; *see also id.*, §§ 1360.1, 1360.5–4, .5–5, .5–6, App. 106, 108–10.

5. Foreign Relations Authorization Act, Fiscal Year 2003, § 214, 107 Pub. L. No. 228, 116 Stat. 1350 (2002).

6. *Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1425–26 (2012).

7. *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (2009). The case was initially brought in the D.C. District Court, which dismissed the complaint on the grounds that *Zivotofsky* lacked standing and that his complaint presented a nonjusticiable political question. *See Zivotofsky v. Secretary of State*, 2004 U.S. Dist. LEXIS 31172 at 9–10 (2004). The Court of Appeals for the D. C. Circuit reversed, concluding that *Zivotofsky* did have standing and remanded the case to the District Court. *See Zivotofsky v. Secretary of State*, 444 F.3d 614, 619 (2006). The District Court dismissed the complaint again on the ground that it presented a political question. *See Zivotofsky v. Clinton*, 511 F. Supp. 2d 97, 103 (2007). The D. C. Circuit affirmed. *See Zivotofsky*, 571 F.3d at 1232–33.

8. Judges Griffith and Williams. *See Zivotofsky*, 571 F.3d at 1233.

9. Judge Edwards. *See Zivotofsky*, 571 F.3d at 1240, 1245.

10. *Zivotofsky v. Clinton*, 131 S.Ct. 2897 (2011), *cert. granted*, 79 U.S.L.W. 3344, (U.S. May 2, 2011) (No. 10–699).

11. *Id.*

12. Official Transcript of Oral Argument, *Zivotofsky*, 132 S.Ct. at 1421.

13. *Id.*

without the benefit of thorough lower court opinions to guide our analysis of the merits.¹⁴

The case is now again before the Court of Appeals for the D.C. Circuit.¹⁵

II. THE CONSTITUTION DOES NOT GIVE THE PRESIDENT THE POWER TO CONDUCT FOREIGN AFFAIRS

The proposition that under the U.S. Constitution the President has the sole power to conduct foreign affairs has become almost axiomatic. When I ask students in my Constitution and Foreign Affairs class “in whom does the Constitution vest the power to conduct foreign affairs,” they invariably respond, year after year, “the President.” When I ask them which clause in the Constitution so provides, they are amazed to discover that there is no such clause. The press routinely refers to the position of the President on foreign affairs matters as the position of United States government, even when Congress has enacted legislation taking a contrary position,¹⁶ as does

14. *Id.* at 1430.

15. *Zivotofsky*, 132 S.Ct. at 1421, *on remand* No. 07-5347, (D.C. Cir. 2012). It was argued on March 19, 2013, before a panel of the D.C. Court of Appeals.

16. *See, e.g.*, Section 3 of the Jerusalem Embassy Act of 1995, 104 Pub. L. No. 45, 109 Stat. 398 (1995), adopted by a vote of 93 to 5 in the Senate, 141 CONG. REC. D 1242-02 (daily ed. Oct. 24, 1995), and 374 to 37 in the House of Representatives, 141 CONG. REC. H 10680 (daily ed. Oct. 24, 1995), stating:

(a) Statement of the Policy of the United States.

(1) Jerusalem should remain an undivided city in which the rights of every ethnic and religious group are protected;

(2) Jerusalem should be recognized as the capital of the State of Israel; and

(3) the United States Embassy in Israel should be established in Jerusalem no later than May 31, 1999.

(The Act includes a waiver provision permitting the President to postpone moving the embassy if he believes it would threaten U.S. National Security to do so). Section 214 of the Foreign Relations Authorization Act of 2002, 107 Pub. L. No. 228, 116 Stat. 1350 (2002), entitled *United States Policy with respect to Jerusalem as the Capital of Israel*, provides in subsection (c): “none of the funds authorized to be appropriated by this Act may be available for the publication of any official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel.” Yet, newspapers continue to refer to the President’s position that the status of Jerusalem should be determined by negotiations as “U.S. policy” or as the “U.S. Government position.” *See Supreme Court: Judges Can Rule on Passport Law*, CHIC. TRIB., March 27, 2012 (The U.S. has long taken the position that sovereignty over Jerusalem . . . must be resolved by negotiations . . .); *Justices Find Pile of Issues in Passport Case*, WASH. POST, Nov. 8, 2011 (the official U.S. policy of neutrality over sovereignty of the holy city). *Party to Vote on Sharon’s Proposal to Leave Gaza: Plan Would Withdraw Settlers and Troops*, WASH. POST, April 12, 2004 (past and current U.S. policy . . . holds that . . . the status of Jerusalem . . . should be resolved only in direct negotiations between the Israelis and the Palestinians); *Arabs Rip New U.S. Law on Jerusalem*, N.Y. POST, Oct. 2, 2002 (“official

the President,¹⁷ and as do the Department of Justice briefs in this case.¹⁸ What is the scope of the President's power in foreign affairs when he and Congress disagree? Is the position of the President the "official position" of the United States, even when it's contrary to a statute?

Although it has been stated by commentators, the Restatement of U.S. Foreign Relations Law¹⁹ and judicial decisions, including decisions of the Supreme Court, that the President has the exclusive power of recognition, and, even more broadly, the sole power to represent the U.S. in relations with foreign countries, the Constitution does not explicitly vest those powers in the President. Indeed, there is no mention in the Constitution of recognition or of foreign affairs.

III. THE CONSTITUTION GIVES CONGRESS MOST OF THE POWERS THAT AFFECT FOREIGN AFFAIRS

The Constitution does provide for the exercise of a number of powers that may affect the conduct of foreign affairs. Some of these powers are vested in Congress, others in the President acting with the advice and consent of the Senate. None are vested in the President alone. Congress has the power to declare war,²⁰ to regulate foreign commerce,²¹ to oversee immigration and naturalization,²² and to define and punish piracy and other

U.S. policy is that the status of Jerusalem should be worked out in negotiations between Israelis and Palestinians").

17. After signing the Foreign Relations Authorization Act of 2002, *supra* note 5, which includes a provision titled "United States Policy with Respect to Jerusalem as the Capital of Israel," and states in section 214(c), "[n]one of the funds authorized to be appropriated by this Act may be available for the publication of any official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel" (emphasis added), the President reportedly said, "U.S. policy on Jerusalem 'has not changed.' That means the U.S. still officially sees Jerusalem as a 'permanent-status issue' to be negotiated between the Israelis and the Palestinians in a final peace accord." *See also Although Bush Says He Doesn't Recognize the Provision, the New US Law Is Sure to Upset Arabs*, CHRIST. SCI. MONIT., Oct 2, 2002.

18. *See* Brief for the Respondent at 2, *Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012) (No. 10-699) ("for the last 60 years, the United States consistent policy has been to recognize no State as having sovereignty over Jerusalem"); *see* Brief for the Appellee at 3, 50, *Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012) *on remand* No. 07-5347 (D.C. Cir., Oct. 10, 2012) ("for the last 60 years, the United States policy has been to take no official act recognizing Israel's . . . claim to sovereignty over Jerusalem"). It is apparently the position of the Justice Department that laws enacted by Congress are not official acts of the United States.

19. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 204 (1987).

20. U.S. CONST. art. I, § 8.

21. U.S. CONST. art. I, § 8.

22. U.S. CONST. art. I, § 8.

offences against the law of nations.²³ The President has the power to make treaties and to appoint ambassadors, but both require the advice and consent of the Senate.²⁴ As Harold Koh, former Dean of Yale Law School and presently the Legal Advisor to the State Department, wrote, “Article I gives Congress almost all the enumerated powers over foreign affairs and Article II gives the President almost none”²⁵

Nowhere does the Constitution vest any power involving foreign affairs exclusively in the Executive. The only function of the President touching on relations with other States referred to in the Constitution that does not require Senate advice and consent is receiving ambassadors. This was clearly not intended as a grant of power. As Professor Henkin noted, receiving ambassadors is not in section two of Article II, which states “[h]e shall have the *power* to . . . ,” but in section three, which states, “[h]e shall receive ambassadors and other public ministers . . . ,”²⁶ with no mention of “power.”²⁷ Had the provision on receiving ambassadors been intended as a grant of power, it would have been logical to include it in section two.²⁸ The drafters of the Constitution did not do so.

Receiving ambassadors was not viewed as an exercise of power by the framers; it was considered a ministerial function.²⁹ Hamilton, Madison, and Jefferson all interpreted the receiving ambassadors clause not as a source of power but as a ministerial and ceremonial function.³⁰

23. U.S. CONST. art. I, § 8.

24. U.S. CONST. art. II, § 2 (The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, . . . and by and with the Advice and Consent of the Senate, shall appoint Ambassadors.).

25. Harold Hongju Koh, *Why the President Almost Always Wins in Foreign Affairs*, THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 158, 159 (David Gray Adler & Larry N. George eds., 1996).

26. U.S. CONST. art. II, § 3.

27. See LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 37–38 (2d ed. 1996) (emphasis added).

28. That is, section two would have provided: “He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . ; and he shall receive Ambassadors.”

29. See Robert Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 47 UNIV. RICH. L. REV. 801 (2010); David Gray Adler, *The President’s Recognition Power*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 133–57 (David Gray Adler and Larry N. George eds., 1996); David Gray Adler, *The President’s Recognition Power: Ministerial or Discretionary?* Presidential Studies Quarterly, 267, 268 (1995) (“the reception of ambassadors was understood as a routine, mechanical function, an almost dutiful act devoid of discretion . . .”).

30. *Id.*

Thus, Hamilton wrote, “[i]t is a circumstance that will be *without consequence* in the administration of the government.”³¹ Madison wrote:

[L]ittle if anything more was intended by the clause, than to provide for a particular mode of communication, almost grown into a right among modern nations; by pointing out the department of the government most proper for the ceremony of admitting public ministers, of examining their credentials, and of authenticating their title to privileges annexed to their character by the law of nations That being the apparent design of the Constitution, it would be highly improper to magnify the function into an important prerogative, even where no rights of other departments could be affected by it.³²

Although a recent Supreme Court decision refers to the President’s “exclusive” power of recognition,³³ earlier decisions of the Court, including one by Chief Justice Marshall, viewed it as a power shared by Congress and the President.³⁴ For example, in *Jones v. United States*, the Court said:

Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political, question, the determination of which by the *legislative* and *executive* departments of any government conclusively binds the judges³⁵

In the view of such prominent commentators as Story and Rawle, Congress not only has power of recognition but its power supersedes that of the President. In his Commentaries on the Constitution of the United States, Story wrote:

If such [executive] recognition is made, it is conclusive upon the nation, unless indeed it can be reversed by an act of Congress repudiating it. If, on the other hand, such recognition has been refused by the executive, it is said, that Congress may,

31. The Federalist No. 69 (Alexander Hamilton) (the real character of the executive) (emphasis added). In the debates over the Neutrality act, Hamilton took a contrary position. See Alexander Hamilton, Pacificus No. 1 (June 29, 1793), reprinted in *The Papers of Alexander Hamilton* 33, 41 (Harold C. Syrett et al. eds., 1969).

32. Adler, *supra* note 29 (quoting James Madison, Helvidius III., available at http://forquignon.com/history/american/constitution/helvidius_iii.htm) (last visited July 31, 2013).

33. See Sabatino *infra* notes 48–49; see also *infra* text accompanying note 50.

34. See *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818) (issues affecting recognition are “rather political than legal in their character” and “belong more properly to those who declare what the law shall be” 16 U.S. (3 Wheat) at 34).

35. *Jones v. United States*, 137 U.S. 202, 212 (1890) (emphasis added).

notwithstanding, solemnly acknowledge the sovereignty of the nation³⁶

William Rawle took the same position. He wrote:

The legislature indeed possesses a superior power, and may declare its dissent from the executive recognition or refusal, but until that sense is declared, the act of the executive is binding.³⁷

IV. THE SUPREME COURT DECISIONS CITED IN SUPPORT OF THE PRESIDENT'S BROAD, EVEN EXCLUSIVE, POWER IN FOREIGN AFFAIRS DID NOT INVOLVE A CONFLICT BETWEEN CONGRESS AND THE PRESIDENT

Several Supreme Court decisions speak of the President's "power"—sometimes "exclusive power"—to conduct foreign affairs. However, none of these cases involved a conflict between Congress and the President. The broadest assertion of executive power over foreign affairs is in *Curtiss-Wright*.³⁸ Justice Sutherland, writing for the Court, stated:

[T]he President alone has the power to speak or listen as a representative of the nation The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.³⁹

However, in that case, there was no conflict between the power of Congress and that of the President. On the contrary, Congress delegated power to the President and the question before the Court was whether that delegation was constitutional. Under Justice Jackson's analysis in *Youngstown*,⁴⁰ this is the strongest case for the exercise of executive power because the President is acting with Congress. As Justice Jackson stated:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate If his act is held unconstitutional

36. Joseph Story, *Commentaries on the Constitution of the United States*, § 1560 (Boston 1833).

37. William Rawle, *A View of the Constitution of the United States of America* AVC United States, at 96 (Phillip H. Nicklein 2d ed. 1829).

38. *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936).

39. *Id.* at 319.

40. *See Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

under these circumstances, it usually means that the Federal Government as an undivided whole lacks power⁴¹

Moreover, even the broad language in *Curtiss-Wright* did not state that the President has exclusive power over matters that affect foreign affairs, only that “the President alone has the power to speak or listen as a representative of the nation.”⁴² As Justice Scalia emphasized in questioning the Solicitor General during oral argument in this case:

[T]o be the sole instrument and to determine the foreign policy are two quite different things. He’s the instrument, but there is certainly room in those many cases for saying that Congress can say . . . what the country’s instrument is supposed to do.⁴³

In *United States v. Belmont*⁴⁴ and *United States v. Pink*,⁴⁵ the Court sustained the President’s power to settle claims in conjunction with United States recognition of the Soviet Union. Here, again, there was no conflict with Congress. Congress has long delegated to the President, either explicitly or implicitly, the power to settle claims against foreign states.⁴⁶ The conflict was with a state law. The Court stated in *Belmont*:

[The] complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.⁴⁷

The opinions in *Curtiss-Wright* and *Belmont* were written more than a half century ago by the same Justice (Sutherland).

In dicta in *Sabbatino*,⁴⁸ Justice Harlan stated that “political recognition is exclusively a function of the Executive.”⁴⁹ That case also did not involve

41. *Id.* at 635–36.

42. *Curtiss-Wright*, 299 U.S. at 319.

43. Official Transcript of Oral Argument at 39, *Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012) (No. 10-699).

44. *United States v. Belmont*, 301 U.S. 324 (1937).

45. *United States v. Pink*, 315 U.S. 203 (1942).

46. See *Medellin v. Texas*, 552 U.S. 491, 531 (2008) (“making executive agreements to settle claims of American nationals against foreign governments is a particularly long-standing practice”) (quoting *Am. Ins. Ass. v. Garamendi*, 539 U.S. 396, 415 (2003)); *Dames and Moore v. Regan*, 453 U.S. 654 (1981).

47. *Belmont*, 301 U.S. at 331 (citations omitted).

48. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

49. *Id.* at 410.

any conflict between Congress and the Executive. Rather, it involved application of the “Act of State” doctrine to enforce a Cuban law even though it violated international law. The Court reasoned that failure to apply the Cuban law might embarrass the Executive in the conduct of foreign affairs. However, when, following that decision, Congress adopted legislation (the Hickenlooper Amendment)⁵⁰ providing that the Act of State Doctrine should not be applied if the foreign act violates international law, the Court of Appeals applied the statute in that very case.⁵¹ No one suggested that the legislation unconstitutionally infringed on the President’s power of recognition or the power to conduct foreign affairs.⁵²

Notwithstanding dicta in decisions of the Supreme Court referring to the President’s broad power over foreign affairs and to his power of recognition as “exclusive,” the Court has never held that the President’s power cannot be limited by Congress exercising its constitutional powers. When executive action conflicts with congressional action, the power of the President is at its lowest. In the words of Justice Jackson:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can only rely upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.⁵³

50. 22 U.S.C. § 2370(e)(2).

51. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967).

52. Perhaps the strongest recent statement of broad executive power in foreign affairs, specifically referring to the President’s power to recognize foreign governments, is in Justice Thomas’ dissenting opinion in *Hamdan v. Rumsfeld*, 548 U.S. 557, 679 (2006). It is clear, however, that in his view this broad executive power exists only when Congress fails to act. He said:

Congress, to be sure, has a substantial and essential role in both foreign affairs and national security . . . [but] Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act, . . . [s]uch failure of Congress . . . does not, especially . . . in the areas of foreign policy and national security, imply congressional disapproval of action taken by the Executive.

Id. (internal quotations omitted).

53. *Youngstown Sheet and Tube Co.*, 343 U.S. at 637.

V. JUSTICE JACKSON'S ANALYSIS IN *YOUNGSTOWN STEEL* SHOULD APPLY TO FOREIGN AFFAIRS

The Supreme Court has never decided which branch has power over matters that affect foreign affairs when Congress and the President disagree. It is suggested that Jackson's famous analysis in *Youngstown* should apply. That is, when Congress and the President agree, as in *Curtis-Wright*,⁵⁴ the question of which branch has the power does not arise. When Congress is silent, the President may act by default, as in *Belmont*⁵⁵ and *Pink*.⁵⁶ But, when Congress legislates on a subject over which the Constitution vests power in Congress, such legislation does not become unconstitutional because it affects foreign affairs.

In an article entitled *Why the President Almost Always Wins in Foreign Affairs*,⁵⁷ Koh says,

First, and most obviously, the president has won because the executive branch has taken the initiative in foreign affairs and has done so by construing laws designed to constrain his actions as authorizing them. Second, the president has won because, for all its institutional activity, Congress has usually complied with or acquiesced in what he has done, because of legislative myopia, inadequate drafting, ineffective legislative tools, or sheer lack of political will. Third, the president has won because the federal courts have usually tolerated his acts, either by refusing to hear challenges to those acts or by hearing the challenges and then affirming his authority on its merits.⁵⁸

In this case, Congress has not "acquiesced in what the President has done."⁵⁹ Congress has adopted legislation requiring the State Department to change its rules with respect to passports for children born to U.S. citizens in Jerusalem. However, in an action to implement that legislation, the District Court⁶⁰ and two Court of Appeals judges "refus[ed] to hear challenges"⁶¹ to the President's acts and one "affirm[ed] presidential authority on its merits,"⁶² the judicial approach described and criticized by Koh as the third reason why the President almost always wins in foreign

54. *Curtiss-Wright Export Co.*, 299 U.S. at 304.

55. *Belmont*, 301 U.S. at 324.

56. *Pink*, 315 U.S. at 203.

57. Koh, *supra* note 25.

58. *Id.*

59. *See id.*

60. *See* sources cited in note 7, *supra*.

61. *See id.*

62. *See id.*

affairs. Ironically, as Legal Advisor, Koh urged the Supreme Court to do exactly that in this case.⁶³

VI. CONCLUSION

The Supreme Court reversed eight to one the lower court's refusal to hear the case. But, even though the Court had requested the parties to address the merits, and much of the oral argument focused on that, the Court declined to decide it, saying it did not have "the benefit of . . . lower Court opinions" to guide its analysis on the merits.⁶⁴

I think it is regrettable that the Court failed to address the question of legislative and executive authority on matters that affect foreign affairs. It is a question of utmost importance today, and one on which commentators and courts look for guidance to dicta in Supreme Court decisions written some seventy years ago.

63. Brief for the Respondent, *Zivotofsky*, 132 S.Ct. at 1421.

64. *Zivotofsky*, 132 S.Ct. at 1430.