No. 10-699

IN THE

Supreme Court of the United States

M. B. Z., by his parents and guardians
ARI ZIVOTOFSKY *et ux*.,
Petitioner,

v.

HILLARY RODHAM CLINTON, SECRETARY OF STATE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF CONGRESSMEMBER ANTHONY WEINER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS M. B. Z., BY HIS PARENTS AND GUARDIANS ARI ZIVOTOFSKY *ET UX*.

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STATEMENT OF INTEREST

Amicus Curiae is a Member of the Congress of the United States of America. He has an institutional interest in the proper, constitutional allocation of authority between the political departments of the federal government. *Amicus* contends that the President must respect and enforce laws duly enacted by Congress, and signed by him, even when those laws bear on the foreign relations of the United States.[1]

STATEMENT

This case touches on the most fundamental constitutional questions: The power of the Congress to make the laws, and the duty of the President to faithfully execute them.

Presidents often contend that the power to determine the nation's foreign policy rests entirely and exclusively in their hands. President George W. Bush did so in the signing statement at the heart of this case.

There is no constitutional basis for such a claim. The Constitution and the cases, not to mention history, demonstrate that both political branches share responsibility for formulating American foreign policy, while the executive branch is charged with executing that policy.

However, the Supreme Court's cases have not made this point with sufficient clarity and emphasis. The Court should therefore use this case to enunciate

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus* certifies that no counsel for a party authored this brief in whole or in part. No person or party other than the *Amicus* or his counsel has made a monetary contribution to this brief's preparation or submission.

the basic principle of constitutional law that Congress too plays a central role in framing foreign policy.

This case also presents the narrower, but equally vital, question of whether the President can sign a law with one hand while vetoing it with the other.

The presidential signing statement has grown monstrous and debased. Presidents once used it appropriately to express their thinking about a bill, or to register concerns and objections. Now, presidents use it as a vehicle to announce that they will not enforce the very statute they are signing into law. That is what President Bush did in this case.

The signing statement danger is not limited to foreign policy. Presidential abuse threatens to undermine the constitutional structure in all areas of law. The Supreme Court should take this case, as it is the rare case in which someone actually has standing to contest a signing statement.

SUMMARY OF ARGUMENT

The text of the Constitution is not particularly lucid in explaining the relationship between the President and Congress in the formulation and implementation of foreign policy. Logic dictates that Congress, as the nation's legislative body, must be the constitutional actor to legislate, in foreign affairs as well as domestic affairs. In fact, Congress has enacted legislation concerning passports and recognition of foreign governments without appreciable controversy.

The Constitution gives the President a few well-defined jobs on the foreign policy front, but that is all. Any theory that turns the President into a foreign affairs legislator upends the fundamental separation

of powers principle. In addition, the presidential assertion that foreign policy legislation invades his private domain and can be ignored violates the keystone obligation of his office: to faithfully execute the laws.

The use of presidential signing statements to declare that portions of laws are unconstitutional, and that the President refuses to enforce them, violates the Presentment Clause and the Faithful Enforcement Clause.

ARGUMENT

I. THIS COURT SHOULD CLARIFY THE RELATIONSHIP BETWEEN CONGRESSIONAL AND PRESIDENTIAL POWERS IN FOREIGN AFFAIRS.

The Constitution sets out some of its rules and principles with simplicity and clarity. The conduct of foreign policy is not among them. The intended roles of the executive and legislative branches are somewhat obscure. As political scientist Edward Corwin mordantly observed: "The Constitution is an invitation to struggle for the privilege of directing American foreign policy." Edward S. Corwin, *The President 1787-1984* 201 (Randall Bland et al. eds., 5th ed. 1984). One federal court has observed that the foreign affairs power is "certainly shared, though the specific boundaries have never been drawn." *Mendelsohn v. Meese*, 695 F. Supp. 1474, 1484 (S.D. N.Y. 1988).

The Supreme Court's jurisprudence has not resolved the tensions.

Sometimes the Court has awarded the laurel to the executive branch. For example, in *United States v.*

Curtiss-Wright Export Corp., 299 U.S. 304 (1936), the Court stated expansively:

> "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. . . . The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."

Id. at 319 (quotation marks omitted).

Curtiss-Wright is often brandished by partisans of exclusive executive control over foreign policy. *See, e.g., Pasquantino v. United States,* 544 U.S. 349, 369 (2005.) But in *Curtiss-Wright* the presidential action under review—prohibition of arms sales in the United States to Bolivia and Paraguay, at war in the Chaco region—was explicitly authorized by a congressional joint resolution. *Curtiss-Wright,* 299 U.S. at 311-312. Thus, the assertion of exclusive presidential command of foreign policy does not arise from the facts of the case, and is mere dictum.

A more satisfying conception, with proper appreciation of the role of Congress, is found in Justice Jackson's influential concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In that case the Court disallowed President Truman's seizure of the nation's steel plants ahead of a labor strike as unconstitutional executive lawmaking. It dismissed the argument that the seizure was validated by the President's constitutional authority as Commander in Chief, arising out of the military's needs during the Korean War. *Id.* at 587.

Justice Jackson added analytical heft to the bare bones majority opinion. He considered that under the

Constitution, the legitimacy of presidential action is directly related to congressional authorization:

> 1. 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. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. 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 rely only 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.

Id. at 635-638 (footnotes omitted) (Jackson, J., concurring).

Note that Justice Jackson's formulation embraces the realm of foreign policy, although not specifically addressing it.

Curtiss-Wright and Justice Jackson's *Youngstown* opinion uneasily coexist. *See, e.g., Dames & Moore v. Regan,* 453 U.S. 654, 661-662 (1981) (contrasting the two opinions). As the Jackson concurrence intimates, the *Curtiss-Wright* proposition that all foreign policy authority resides in the executive can be right only if Congress is constitutionally disabled from legislating on any aspect or facet of foreign affairs. And that is plainly false.

This Court should finally dispatch and bury the dicta of *Curtiss-Wright.*

A. THE CONSTITUTIONAL GRANT OF LEGISLATIVE POWER TO CONGRESS CONTAINS NO TEXTUAL RESTRICTION TO DOMESTIC AFFAIRS. CONGRESS REGULATES PASSPORTS AND RECOGNITION OF FOREIGN GOVERNMENTS.

The Constitution entrusts the power to legislate to Congress. It nowhere states that Congress' competence to make laws stops at the water's edge.

Begin with first principles: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. Const., art I, § 1. This comprehensive grant of law-making authority to Congress logically includes foreign policy. Any other view of the political branches would transmute the executive into a *legislature* regarding foreign policy, a serious blow to the separation of powers principle.

It is true that Congress often permits the President to take the lead in guiding the nation's foreign policy. Such examples fall under the first branch of Justice Jackson's taxonomy in *Youngstown*, and seldom arouse controversy. But the separation of powers at the core of the Constitution means that Congress remains the legislature, with the right to assert its policy-making authority in foreign affairs.

In particular, Congress can—and does—regulate passports, although passports are issued by the executive branch's Department of State. This Court laid out some of the relevant history in *Kent v. Dulles*, 357 U.S. 116 (1958):

> Prior to 1952 there were numerous laws enacted by Congress regulating passports and many decisions, rulings, and regulations by the Executive Department concerning them. Thus in 1803 Congress made it unlawful for an official knowingly to issue a passport to an alien certifying that he is a citizen. In 1815, just prior to the termination of the War of 1812, it made it illegal for a citizen to "cross the frontier" into enemy territory, to board vessels of the enemy on waters of the United States or to visit any of his camps within the limits of the United States, "without a passport first obtained" from the Secretary of State or other designated official.

> The Secretary of State took similar steps during the Civil War. In 1850 Congress ratified a treaty with Switzerland requiring passports from citizens of the two nations. Finally in 1856 Congress enacted what remains today as our basic passport statute.

Id. at 122-123 (citations omitted).

The Secretary of State's authority to issue passports and to regulate their use is explicitly granted by statute. 22 U.S.C. § 211a. Since Congress created the passport authority, it can regulate that authority.

For example, in *Haig v. Agee*, 453 U.S. 280 (1981), the Court upheld the Secretary of State's power to revoke a passport, on the ground that the regulation at issue was congruent with 22 U.S.C. § 211a. Impliedly, if the regulation had clashed with the legislation, the regulation would have been struck down, per the dictum of *Japan Whaling Ass'n. v. American Cetacean Soc'y.,* 478 U.S. 221 (1986): "The Secretary, of course, may not act contrary to the will of Congress exercised within the bounds of the Constitution. *If Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter.*" *Id.* at 223 (emphasis added).

In this case, Congress has enacted a passport regulation: an American citizen born in Jerusalem may have "Israel" entered in his passport as his place of birth. Since "Congress has directly spoken to the precise issue in question," this Court should see to it that "that is the end of the matter."

Moreover, Congress can—and does—participate in the recognition of foreign governments. The federal courts have recognized this fact.

In *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918), the plaintiff sought recovery of goods appropriated by General Carranza in the Mexican Civil War. The Court held that plaintiff must sue in the courts of Mexico, because the U.S. government had recognized the Carranza government. The Court stated:

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive *and Legislative*—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. It has been specifically decided that "Who is the sovereign, de jure or de facto, of a territory is not a judicial, but is a political question, the determination of which *by the legislative and executive departments of any government* conclusively binds the judges, as well as all other officers, citizens and subjects of that government."

Id. at 302 (citations omitted, emphasis added). *Accord, Medellin v. Texas,* 552 U.S. 491, 511 (2008); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972).

In a more recent example, Congress has co-directed the nation's relations with the Palestine Liberation Organization. In the Anti-Terrorism Act of 1987, Congress determined that the PLO is a terrorist organization. 22 U.S.C. § 5201. Congress forbade receiving anything of value from the PLO save information, expending funds from the PLO, or establishing or maintaining a PLO office in the United States. 22 U.S.C. § 5202. The federal district court found this to be a valid and appropriate exercise of

Congress' foreign affairs powers. *Mendelsohn v. Meese*, 695 F. Supp. 1474, 1483 (S.D. N.Y. 1988). The court there significantly made a comment that remains pertinent today:

> We are aware of no case striking down federal legislation as an encroachment of the executive's authority to conduct foreign affairs, and counsel for the plaintiffs has not brought any to our attention despite a specific inquiry to him at oral argument. There appears, therefore, no jurisprudence in this area, despite the existence of much legislation which has been criticized as an encroachment upon presidential authority to conduct foreign affairs.

Id. at 1483.

The Executive Branch did not protest this congressional crowding on its turf, but instead promptly relied on the Anti-Terrorism Act of 1987 in an effort to close the PLO Observer Mission to the United Nations. *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D. N.Y 1988).

Even on the specific question of Israeli control of Jerusalem, Congress has a history of legislation. In 1995, Congress passed the Jerusalem Embassy Act. Its object is to require the removal of the U.S. Embassy to Israel from Tel Aviv to Jerusalem. It includes the following:

> 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.

Pub. L. No. 104-45, § 3, 109 Stat. 398 (1995).

This law states "the policy of the United States," not the mere preference of Congress. This refutes the notion that Congress holds no power to recognize foreign governments and their sovereignty over particular territories.

But if it is considered that the point remains doubtful, the Court should grant cert in this case and settle it.

B. THE CONSTITUTION CONTAINS NO TEXTUAL COMMITMENT OF FOREIGN POLICY TO THE EXECUTIVE BRANCH.

One searches in vain for a constitutional proof text for presidential domination of foreign affairs.

Preliminarily, constitutional "legislative" history on the allocation of powers between President and Congress is of limited use, because the Founders changed their opinions about what the Constitution forbids, permits or requires, based on the political exigencies of the moment. *See* Joseph M. Lynch, *Negotiating the Constitution: The Earliest Debates Over Original Intent* (1999). Let's stick to the text.

Article II, section 1 states: "The executive Power shall be vested in a President of the United States of America." Some argue that the eighteenth century understanding of "executive power" subsumed foreign policy. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs,* 111 Yale L.J. 231, 234 (2001). This will please folks predisposed to that conclusion, but the evidence is inconclusive, as it must be in all such questions of how "the eighteenth century" would have understood a concept as broad as "executive power." *See* Curtis A. Bradley and Martin S. Flaherty, *Executive Power Essential-*

ism and Foreign Affairs, 102 Mich. L. Rev. 545, 551 (2004).

On the other hand, the Constitution has several specific grants of power that bear on foreign relations. Article II, section 2 makes the President the Commander in Chief. But this case does not concern the President's war powers or national security, so that's beside the point. This section also gives the President the power to make treaties, but this case involves no treaties.

Article II, section 3 directs that "he shall receive Ambassadors and other public Ministers." This seems closer to the mark. But to the extent that receiving ambassadors involves recognition of governments, this Court has suggested that such determinations are shared by the political branches.

In *United States v. Belmont*, 301 U.S. 324 (1937), the U.S. government's recognition of the Soviet Union extinguished certain claims for money held in a private bank which the Soviet government had nationalized. The Court stated: "[W]ho is the sovereign of a territory is not a judicial question, but one the determination of which by the *political departments* conclusively binds the courts." *Id.* at 328 (emphasis added). Admittedly, this is dictum, as it was the President who extended recognition to the Soviet Union. The point awaits Supreme Court clarification.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) is cited for the proposition that "[p]olitical recognition is exclusively a function of the Executive." *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1231 (D.C. Cir. 2009), rehearing denied, 610 F.3d 84 (D.C. Cir. 2010). The *Banco Nacional* case questioned Cuba's right to sue in U.S. courts, in view of Washington's

refusal to recognize Cuba's Communist government. But the holding was that the *courts* could not substitute their judgment for that of the President. *Banco Nacional,* 376 U.S. at 410-411. The Court was not analyzing the relative roles of the legislative and executive branches, and the case should not be interpreted that way.

Similarly, in *Williams v. Suffolk Ins. Co*., 38 U.S. 415 (1839), this Court held that the judiciary is bound by a presidential determination as to which country exercises sovereignty over particular territory. *Zivotofsky v. Sec'y of State,* 571 F.3d at 1231. But there was no legislative-executive quarrel in *Suffolk Ins. Co.* The question of which would prevail in the face of such a conflict was not presented, and not decided. The question remains open.

No, there is no distinct constitutional assignment of foreign policy to the executive department. Nor does any specific grant of foreign policy authority apply to this case. Thus, what is really at stake in this case is the Article II, section 3 requirement that the President "take Care that the Laws be faithfully executed."

In this case, the President asserts the right to ignore a law passed by Congress (and signed by him!) on the ground that it touches on foreign affairs. Justice Jackson's words from *Youngstown* reverberate:

> *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 rely only 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.*

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 638 (1952) (emphasis added) (Jackson, J., concurring).

The President's claim of exclusive power over foreign relations can be sustained only if Congress is constitutionally ousted from acting in this arena. Or it is a presidential usurpation, and Congress remains the national legislature after all.

II. USING A PRESIDENTIAL SIGNING STATEMENT AS A BACKDOOR VETO IS UNCONSTITUTIONAL.

The signing statement is not intrinsically illegitimate. But when abused as it was in this case, it violates Article I, section 7, clause 2, the Presentment Clause of the Constitution. It also violates Article II, section 3's requirement of faithful execution.

The institution of the presidential signing statement goes back to our fifth president, James Monroe, in the first quarter of the nineteenth century. American Bar Association, *Report of the Task Force On Presidential Signing Statements And The Separation Of Powers Doctrine*, http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf 7 (2006). Presidents used their signing statements, among other things, to signal their policy disagreements with Congress. *Id.*

In the 20th century, presidents started dealing with constitutional doubts about bills by announcing statutory interpretations that satisfied their concerns. For example, President Truman stated that he would regard a section in an appropriations bill as "an authorization" rather than as a "directive." *Id.* at 8-9.

Gradually, presidents, including Eisenhower, Nixon, Ford and Carter, began to use the signing statements to declare portions of laws unconstitutional, and announce their intentions not to enforce the repugnant bits. *Id.* at 9.

This practice achieved a climax with President George W. Bush:

> From the inception of the Republic until 2000, Presidents produced signing statements containing fewer than 600 challenges to the bills they signed. According to the most recent update, in his one-and-a-half terms so far, President George W. Bush (Bush II) has produced more than 800.

Id. at 14.

Remarkably, President Bush apparently viewed the signing statement as a *substitute* for vetoing legislation: "Bush had also virtually abandoned his veto power, signing every bill that reached his desk during his first term even as he used signing statements to eviscerate them." Charlie Savage, *Symposium: The Last Word? The Constitutional Implications Of Presidential Signing Statements: Introduction,* 16 Wm. & Mary Bill Rts. J. 1, 2 (2007).

However, *Amicus* emphasizes that this is not a partisan issue. The presidential abuse has been bipartisan. Congress has a bipartisan interest in ending the abuse.

Article I, section 7, clause 2, states:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it,

> but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.

The Constitution contemplates either presidential approval or veto of a "bill." If vetoed, Congress gets a chance to override that veto. There's no authority for carving up a bill, approving part of it and vetoing the rest. But that is precisely what has been done with some signing statements, including the one at issue here.

In *Clinton v. City of New York*, 524 U.S. 417 (1998), the question was whether the line item veto was constitutional. The answer was No. In an analysis relevant to our case, the Court said:

> In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each. "Repeal of statutes, no less than enactment, must conform with Art. I." There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes. . . . Moreover, after a bill has passed both Houses of Congress, but "before it becomes a Law," it must be presented to the President. If he approves it, "he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." Art. I, § 7, cl. 2. His "return" of a bill, which is usually described as a "veto," is subject to being overridden by a two-thirds vote in each House.
>
> There are important differences between the President's "return" of a bill pursuant to Article

> I, § 7, and the exercise of the President's cancellation authority pursuant to the Line Item Veto Act. The constitutional return takes place *before* the bill becomes law; the statutory cancellation occurs *after* the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part.

Id. at 438-439 (citations and footnotes omitted).

The Court rejected the line item veto, concluding that "the power to enact statutes may only be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id.* at 439-440 (citation and quotation marks omitted).

When a presidential signing statement declares part of a bill unconstitutional and not to be enforced, it effectively vetoes that fragment of the bill. As in *Clinton v. City of New York,* the "finely wrought" constitutional procedure for enacting legislation is vandalized, because the Constitution does not allow a partial veto.

Thus, this case presents a procedure similar to the line item veto condemned in *Clinton v. City of New York*, but even worse: first, signing statements are not limited to spending bills; second, Congress cannot vote to override a signing statement.

This executive branch abuse has escaped judicial review. As the *ABA Task Force on Presidential Signing Statements Report* wryly notes:

> At present, the standing element of the "case or controversy" requirement of Article III of the Constitution frequently frustrates any attempt to obtain judicial review of such presidential claims of line-item veto authority that trespass on the lawmaking powers of Congress. . . .

> For individual plaintiffs, a signing statement might well elude the case or controversy requirement because the immediate injury is to the lawmaking powers of Congress. The President thus becomes the final judge of his own constitutional powers, and he invariably rules in favor of himself.

ABA Task Force on Presidential Signing Statements Report at 25.

Congress, however deeply interested it may be in abusive signing statements, suffers only an "institutional injury." Despite the recurring nature of the injury, Congress lacks standing. *Raines v. Byrd*, 521 U.S. 811, 821 (1997).

But the president's signing statement refusing to enforce section 214(d) of the 2003 Foreign Relations Authorization Act, which he signed into law, has injured Petitioner and given him standing. Thus, the Court should seize the opportunity to address this constitutional issue—so important, yet otherwise so unlikely to receive judicial scrutiny. The opportunity may never recur.

CONCLUSION

Foreign policy is not a presidential preserve. But there is as ongoing executive branch attempt to erect a barricade topped with a banner: "FOREIGN POLICY MADE HERE—CONGRESS KEEP OUT." If successful, the President essentially becomes the *legislator* of American foreign policy. This does violence to the constitutional scheme of separation of powers.

The executive's monopolistic impulse is sometimes coupled with a presidential signing statement practice that violates the constitutional requirement of faithful execution of the laws.

This case would not require the Court to become mired in adjudicating the status of Jerusalem. *Zivotofsky v. Sec'y of State*, 610 F.3d 84, 86 (D.C. Cir. 2010) (statement by Senior Circuit Judge Edwards upon denial of petition for rehearing *en banc*). But it would be an excellent vehicle for the Court to straighten out the confused and misguided doctrine and practice revealed in this case.

Respectfully submitted,

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