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# Who Speaks for the 'People' on Policy?

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# Who speaks for the 'people' on policy?



ALAN GARFIELD

Who is supposed to make policy for our country, Congress or the president?

The Constitution says "[a]ll legislative Powers" are vested in Congress and that the president "shall take Care that the

Laws be faithfully executed." Does this imply that Congress composes the nation's policy and the president just plays the congressional tune? Or is the president, like a good musician, permitted to interpret Congress' notes, to improvise, or even to change the melody if he comes up with something better?

Perhaps Congress and the president make policy collaboratively. But if so, what role does each branch play? Who's Rodgers? Who's Hammerstein? Does one specialize in lyrics (say domestic policy) and the other in music (say foreign policy)? And what happens if the collaborators disagree?

The Constitution doesn't answer these questions, and the framers were of varying opinions. The Supreme Court is also reluctant to resolve these inter-branch disputes. Often, the Court will let the two "political branches" sort things out themselves with the knowledge that voters can ultimately hold them accountable.

But occasionally the Court accepts one of these "separation of powers" issues and chooses to rule on whether one branch has infringed on the rights of another. One such case is being heard by the Court today. It concerns the status of Jerusalem, that "City of Peace" which is so often embroiled in conflict.

Ever since Israel was created in 1948, presidents have steadfastly refused to take a stand on which nation has sovereignty over Jerusalem. They have preferred to stay neutral on Jerusalem's ownership, expecting that the issue will be resolved only when there is a comprehensive peace settlement among Israel, the Palestinians and Israel's surrounding Arab neighbors.

One way this neutrality manifests itself is in the State Department's Foreign Affairs Manual. The manual specifies the information to be included on an American's passport, including the rules for what to put as a person's "place of birth." The general rule is to put "the country of the applicant's birth." But for applicants born in Jerusalem, the manual says to put only "Jerusalem" and not a country.

Congress sought to override this rule when it passed the Foreign Relations

Authorization Act of 2003. One provision in that act commands the Secretary of State to put "Israel" as the place of birth for any American who was born in Jerusalem and who requests to have Israel indicated.

Menachem Zivotofsky is a U.S. citizen who was born in Jerusalem in 2002 to two American parents. His mother applied for her son's U.S. passport and requested that his birthplace be listed as "Jerusalem, Israel." The State Department, following its manual, listed only "Jerusalem."

And so began this epic battle between the executive and legislative branches. Does the president, as Secretary of State John Kerry contends, have the exclusive power to decide which foreign nations to recognize and the limits of their territory? Does Congress have the power to make such decisions or, more minimally, to set the rules for passport information?

No constitutional provision expressly gives presidents the power to recognize foreign countries. But Kerry points to a clause that does give presidents the power to "receive ambassadors." Kerry says that this power implies the power to recognize countries.

Kerry also points to a long history of presidents recognizing foreign nations without congressional authorization. The earliest example is President Washington receiving the minister from France after the French Revolution. Washington's Cabinet concluded that the president could receive this minister without first consulting Congress, even though doing so would implicitly recognize the new French government.

The Zivotofsky family points to Congress' powers to regulate immigration and foreign commerce as sources of Congress' power to regulate passports. The family also counters Kerry's historical examples with examples of its own, including congressional acts during the Adams and Jefferson administrations that resolved the status of Santa Domingo and rejected Haiti's claim of independence.

The Court of Appeals ruled for Kerry. It held that presidents have exclusive power to recognize foreign governments and that the congressional act requiring the listing of "Israel" interfered with that power.

The Supreme Court will tell us what it thinks before the end of June. In the meantime, try not to think about the passport for an American recently born in Crimea.

Alan Garfield is a professor at Widener University School of Law.