

## Brief in Favor of the Petitioner in the case of Zivotofsky v. Kerry – By Jered Jenkins and Taylor Hopkins

Jered Jenkins

Taylor Hopkins

Argument for Zivotofsky

Case: Menachem Binyamin Zivotofsky v John Kerry, Secretary of State

Facts:

Who: Zivotofsky (Prosecution), and John Kerry (Defense)

What: For the previous sixty years, the POTUS, through the use of his secretary of state , John Kerry, has never recognized any country having control over the city of Jerusalem, despite the fact that the city is within the country of Israel. Due to this policy, passports of american citizens who were born in Jerusalem note their country of birth as Jerusalem, rather than Israel. In 2002 however, Congress passed a mandate claiming that the Secretary of State should label a Jerusalem born citizen's country of birth of Israel should their guardians demand it. In response to said mandate, John Kerry claimed that the POTUS alone had the power of recognition of foreign nations. Zivotofsky, whose son was born in Jerusalem, argues that the POTUS does not have sole power over the recognition of Jerusalem as an independent city, such as the Vatican, and that history shows that what authority the president holds in regarding the power of recognition is left subject to congress.

Issue: Should the POTUS have sole power over recognition of foreign states, without the approval of Congress?

How: This case made it to the SCOTUS because of the contrasting ideals of the past judges, as well as the contrasting articles and guidelines in the Constitution. While the Congress holds power to regulate foreign relations, the POTUS always receives foreign ministers, and is the Commander in Chief of the US Armed Forces.

### Table of Cited Authorities:

-Article I of the Constitution

-Article 2 of the Constitution

-Alexander Hamilton

-William Rawle

-Helvidius No. 3 (James Madison)

### Statement of Argument:

In this argument, history strongly supports the position held by Zivotofsky; that the power over the recognition of foreign states is held by both Congress and the president, not the president alone. While it is true that the POTUS may receive foreign ministers, and is in fact the Commander in Chief of the U.S. Armed Forces, he or she alone does not have the power to recognize the legitimacy and sovereignty of foreign nations, that power falls to congress, and the system of checks and balances established under the Constitution ensures this. Fearing a power struggle between the three, branches of government, the framers established a system of checks and balances, revolving around the principle of the separation of powers, effectively preventing ambition with ambition. In this instance, the POTUS may receive foreign ambassadors, but he/she does not have the authority associated with the powers of recognition. The president's power to receive ambassadors is simply meant to effectively communicate with foreign nations, nothing more, nothing less. It would be incorrect to assume that the powers granted to the president under the constitution allowed him/her alone to wield the power of recognition. While Zivotofsky may have his own reasons for petitioning, his petition is sound in how the president alone is not granted the power of recognition. The power of Recognition is instead shared by both the Executive and Legislative branches of Government.

### Argument:

Based off of the historical sources provided, the argument that the Congress shares the power of recognition is strongly supported. There are numerous clauses present in Article

One of the Constitution that describe the powers held by Congress in regards to foreign relations. Congress was meant to regulate commerce with foreign nations (Article 1 Section 8 Clause 3), coin money and judge the value of foreign coin (Article 1 Section 8 Clause 5), punish crimes on the high seas (Article 1 Section 8 Clause 10), and hold the power to declare war with foreign nations (Article 1 Section 8 Clause 11). Given these powers, it seems only natural that Congress would hold the power of recognition as well. How could Congress regulate commerce and declare war with foreign nations if it didn't even have the authority to recognize the legitimacy and sovereignty of a foreign state? Some powers regarding foreign relations were also extended to the president under the constitution. As stated under Article 2 Section 2 Clause 1, the president shall have power to "receive ambassadors and other public Ministers". However, as stated by Alexander Hamilton in the Federalist Papers No.69, the president's power to receive foreign ambassadors is more a matter of "Dignity than of Authority", suggesting that the president was meant to hold little, if any, authority in such matters. The powers granted to president were based off of principles, out of the necessity of communication with foreign powers as stated by James Madison in Helvidius No.3. If anything, the powers held by the President were meant to illustrate the obligations of the Legislative and Executive branch. For instance, should a foreign nation go through a revolution, ambassadors could meet with the president in order to form a judgement of the new rulers of said country in order to decide whether any previously held treaties between the U.S. and said country should be suspended as a result of the revolution. Should any held treaties apply an alliance based relationship, the task would fall to the Legislative branch to decide whether any military actions should be taken. In this instance we see how the powers of recognition can be shared, however, the president's authority is still left subject to congress outside of instances similar to this one. Outside of historical examples, one must ask "Just about allowing one man/woman have the power of recognition so dangerous?" There is of course the possibilities of bias and favoritism with such authority. What is there to stop the president from refusing to recognize the legitimacy of a unfavorable country? How can congress exercise its authority of regulating commerce with foreign nations if the president refuses to recognize the sovereignty of said nation? Granting the power of recognition to the president alone completely defeats the purpose of the separation of powers, as congress is now dependant on the president's ruling of the recognition of foreign nations before the congress can take any actions regarding said nation. Both of the legislative and executive branches have some sort of authority extending to foreign nations, the legislative with its regulation of trade and declaration of war, and the executive with its ability to receive ambassadors and sign treaties. Through this, we can see how the power of recognition could have been meant to have been shared, or simply agreed on between the legislative and executive branches, as if one branch held the power of recognition, the other would be entirely dependent of its ruling. But why is the president's ruling subject to congress? Well it only seems proper that congress would

have more authority over such matters than the president. Having multiple members in congress minimizes the chance to bias that might have been held by the president, and the congress already has more authority in the involvement of foreign nations as a whole.

### Conclusion:

The POTUS alone does not hold the power of recognition, as the founding fathers of this country specifically laid the foundations of the constitution in order to discourage a strong, sole leader. This country was based off of equal representation, and the idea that no man or woman, no matter how far they ascended, would ever hold more power than another branch of government, and the powers the POTUS is claiming today is doing just that. The checks and balances system is being completely overridden by the presidents blatant disregard for congress. The power of recognition was meant to be shared by congress and the president, and at times such as these, the president's authority regarding the power of recognition is left subject to congress. It is highly supported by history that the president was never meant to hold the power of recognition alone, that the authorities granted to the president were done so out of principle and dignity. As stated in the constitution, congress was meant to regulate commerce with foreign nations (Article 1 Section 8 Clause 3), coin money and judge the value of foreign coin (Article 1 Section 8 Clause 5), punish crimes on the high seas (Article 1 Section 8 Clause 10), and hold the power to declare war with foreign nations (Article 1 Section 8 Clause 11), while the president had the power to "receive ambassadors and other public Ministers" (Article 2 Section 2 Clause 1). However the authority granted to the president, was more of a matter of "Dignity than of Authority" as stated by Alexander Hamilton in the Federalist Papers No.69. If anything, the president's power could be used to illustrate the obligations of the legislative and executive branches. For instance, the power of recognition is shared between the legislative and executive branches, such as the recognition of a new authority in a foreign country after a revolution, as such a situation would require the review of previously held treaties and agreements between the previous authority of said country. Given this, the SCOTUS should decide for Zivotofsky, as the checks and balances systems needs to be upheld. Article IX states that congress has the "sole and exclusive power of sending and receiving ambassadors." Without the constant application of the checks and balances system, corruption will creep into the federal government, and that's exactly what's happened with the POTUS overstretching his reach.