

## Brief in Favor of the Petitioner in the Case of Zivotofsky v. Kerry—by Azhar Ali and Blake Ver Woert

Zivotofsky v. Kerry Brief

Table of Cited Authorities:

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William Rawle, A View of the Constitution of the United States, Chapter XX (1829)

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1 St. George Tucker, Blackstone's Commentaries (1803)

Statement of Argument:

We support the side of Zivotofsky in that he should be permitted by the U.S. government to have the ability to put his place of birth as “Israel,” and not “Jerusalem.” The President can use his recognition power in order to recognize a certain entity or regime as a true state or government. It is an important way to gain relations with the United States. Since the creation of the state of Israel in 1948, the president has never recognized a country that has had control over the city of Jerusalem, even though it is located inside the state of Israel. This is due to religious groups claiming Jerusalem as a holy city, including Christians, Muslims, and Jews. If the U.S. recognizes Jerusalem being controlled by Israel, a predominantly Jewish state, the retaliations from Christians and Muslims could become a major problem. Zivotofsky argues that he should be able to list his place of birth as Israel because the recognition power of the President is only due to the laws that have been passed by Congress. He says that the President cannot have free reign of his recognition power without the checks and balances of Congress. However, Secretary of State John Kerry argues that the President can, in fact, use his recognition power with free reign because

there are no laws that inhibit him from doing so. Due to the potential of conflict between religious groups, Zivotofsky's son should be able to list himself as born in Israel.

### Argument:

The Constitution of the United States grants power over aspects foreign relations to both Congress and the Executive branch in various forms and at varying degrees of influence. The powers afforded to Congress as stated in Article I of the US Constitution include: “the power to regulate commerce with a foreign nation”, “the power to coin money, regulate the value thereof, and of foreign coin”, and “the power to declare war” on a foreign nation. It does not however enumerate who has the authority to recognize a world power. The ability granted to the President and the Executive branch to receive foreign ambassadors, emissaries, or representatives has often been used to justify granting the Executive the power to recognize states officially. This power is, however, not granted officially by the United States Constitution. The Question in the Case of Zivotofsky v. Kerry is whether or not the powers that are enumerated in the constitution allow Congress to make the decision as to the official recognition of a state, and whether they may override the Executive Branch in making this decision. The diplomatic recognition of powers is the recognition of another government's authority as a nation. It is particularly important in world politics as it could determine the nature of diplomatic interaction between groups.

In 2002 Congress passed a law that granted citizens born in Jerusalem the ability to list their place of birth as Israel on their passport if they so choose, which was previously not allowed despite the fact that Jerusalem is a city in Israel. This created conflict with the Secretary of State's office however, as the law contradicted the policy that had been established by the Secretary of State and the Executive branch, which recognizes Jerusalem separately and requires citizens born in Jerusalem to list the city as their place of birth. Jerusalem is considered a holy city by Christians, Muslims, and Jews, and in an effort to maintain neutrality between the groups, the executive branch has pursued a policy that emphasizes this more neutral form of recognition. This action calls into question which branch should have the power to make this decision, and what the scope of that power is. The power of the United States Government to recognize a foreign nation, despite its importance, is not written into the US Constitution. Thus, it is important to consider the powers granted by those other sections of the Constitution, as well as the precedents established by our national leaders and the Supreme Court of the United States.

Historically, the executive has been granted, and maintained the power to receive foreign ambassadors or ministers of a foreign power. This power is granted by Article II of the constitution. In the past many expanded the scope of this power to officially include the recognition of foreign powers. What is being called into question here by this case, and by

Mr. Zivotofsky is whether or not this is the appropriate scope of this power and what exactly that entails. It also calls into question the role that congress plays in the recognition of foreign powers and in this case specifically. This assumption, historically, and in the modern world, that the power to receive ambassadors or ministers also grants the power to recognize that foreign power officially, is based only on the fact that this particular power is not explicitly spelled out in the constitution. Indeed, accepting an ambassador or minister to conduct diplomatic relations can be seen as a form of recognition of that ambassador or minister's power, and the power of the nation that he represents. However, this should not be taken as recognition of that power in an official capacity. As noted by Supreme Court Justice Joseph Story in 1833, "a refusal is sometimes made on the ground of the bad character of the minister, or his former offensive conduct, or of the special subject of the embassy not being proper, or convenient for discussion. This, however, is rarely done." Refusing to accept an ambassador or minister in diplomatic relations can be taken as a hostile and unfriendly action regardless of the capacity in which that nation is recognized, thus it is rarely done. The only exception made by Story was in the case of civil war: "But a much more delicate occasion is, when a civil war breaks out in a nation, and two nations are formed, or two parties in the same nation, each claiming the sovereignty of the whole, and the contest remains as yet undecided, flagrante bello. In such a case a neutral nation may very properly withhold its recognition of the supremacy of either party".

Furthermore, the premise that the Executive is the sole determiner of whether or not a foreign power will be officially recognized by the United States government, is based on the expansion of a separate power granted by the Constitution. There is no basis in the

180. 3. In it he states that the ceremonial power to receive ambassadors and ministers has been given to the branch to which it is most appropriate, as such ambassadors and ministers are the representatives of the heads of state of other nations, and as such should be recognized by the head of state of the nation which is receiving them. He goes on to clarify that the "magnification" of such powers to include the ability to recognize another world power in an official capacity would be an inappropriate action, particularly in granting a power of such importance and function in government affairs. The ability to recognize or acknowledge the sovereignty of a foreign power and its right to that power, he argues, belongs to the nation as a whole. Indeed, the ambiguity of the matter in the text of the Constitution should not mean that the decision immediately goes to the executive branch. This is a matter that must be decided in the context of the nation as a whole, and in this way, is a matter that should be decided by the nations representatives.

This is not to say that the Executive branch has not in the history of the United States, had power over the recognition of foreign powers. Indeed throughout much of the United States history it was the executive that has had the power to do this. It is however important to call into question the scope of such a power. Congress in the pursuit of its duties should have some input over the decision as the grant of these powers is constitutionally ambiguous. Indeed it could be argued that the legislature's power over this matter should be superior to that of the executive, and that it should have the power to override the executive in these cases. William Rawle, a founding father and US Lawyer made the point that Congress should not be absent from the conversation of diplomatic recognition. In *A View of the Constitution of the United States* he states: "the power of receiving foreign ambassadors, carries with it among other things, the right of judging in the case of a revolution in a foreign country, whether the new rulers ought to be recognized [sic]. The legislature indeed possesses a superior power, and may declare its dissent from the executive recognition or refusal". Furthermore, the power of Congress to ratify treaties on behalf of the United States must be taken into consideration. Like the Executive's power to receive ambassadors, emissaries, or ministers, this power has an indirect effect on what may be perceived as the recognition of a power. It is important to consider for example, the conflict that may arise if Congress unofficially recognized an existing power by maintaining a treaty with that power, while the executive has refused to acknowledge their ambassadors. With both branches taking up a considerable role in this matter, and the Constitutional ambiguity on the situation being taken into account, Congress should not be excluded from the recognition of power, and the Executive should not be the sole recognizer of a world power within the US government.

#### Conclusion:

The Executive branch of the United States Government has, in its attempt to maintain neutrality over the varying factions and groups currently in Jerusalem has set a policy that separates it from its home country of Israel on United States passports. Those born in Jerusalem, even if they identify as Israeli are not given a chance to express this fact on their passports. Citizens such as Zivotofsky have the right to have his birthplace be listed as Israel and not Jerusalem, as mandated by the United States congress in 2002. The Constitution remains ambiguous on the matter of recognition of powers, and only enumerates in the President the power to recognize Representative and Ministers of other nations. This should not be construed to include the explicit and unwavering recognition of power, without discussion. Thus, there is little Constitutional basis for the recognition of power to be held solely by the Executive branch. The matter of recognizing a world power, is one that is integral to the interests of the nation as a whole, and in the absence of explicit rights to that power, Congress should not be excluded from the decision.

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