# Brief in Favor of the Petitioner in the case of Zivotofsky v Kerry – Victoria Miller and Hayley Brown

After being born in the city of Jerusalem, Manachem Zivotofsky and his parents, two United States citizens, asked that the United States record the place that Manachem Zivotofsky was born as "Israel" and not "Jerusalem" in correspondence with the Foreign Relations Authorization Act that Congress passed in 2003. The State dissented with the plea and issued to Manachem Zivotofsky a passport listing his place of birth as "Jerusalem" instead. In lieu of their son, Ari and Naomi Zivotofsky sued the Secretary of State, John Kerry, to pursue the enforcement in reference to the Foreign Relations Authorization Act of 2003. The case was initially dismissed in district courts on account of that it bestowed a non-justiciable political question. The United States Supreme Court reopened the case in Zivotofsky v Clinton. The district courts held that the Foreign Relations Authorization Act "impermissibly interferes" with the power held by means of the President for recognition in reference to foreign states. The United States Court of Appeals agreed, stating that Congress does not have the range of passport powers to change United State foreign policy, something that only the executive branch may have control over as recognized in the Constitution.

## Statement of Argument

The job of Congress is to formulate and construct laws that enable the government as well as the society of the United States to function well. By passing a law dictating that citizens have a choice between establishing their place of birth as "Israel" as opposed to "Jerusalem", the United States Congress encourages peace between its foreign citizens and understanding that their nationality plays a large role in their lives. Diplomatic recognition is an imperative factor in sanctioning sovereign nations as a state. As petitioners today we are advocating three things: one, that the power of recognition of foreign governments lies with the President only to the extent of the laws that Congress has passed surrounding that recognition, as long as these laws are Constitutional and better serves the United States. Two, that the congressionally enacted statute that requests the Secretary of State to provide the record of birthplace of an American citizen born in Jerusalem on a Consular Report of Birth Abroad on a United States passport is constitutional on the grounds that the law does not infringe on the President's exercise of the recognition of power. Three, that within the recognition of power, if the concern of recognizing a sovereign nation lies in the fear that recognizing the nation will result in war, that Congress – who is granted the power to declare war by means of the Constitution – should be able to counter the executive branch in occasion of granting recognition on passports.

Recognition power is a power reserved for the President, and the President alone, to decide whether or not a country/state is recognized by the United States. Historical examples in reference to this power being used is in occasion of Washington recognizing the French Republic and of Truman recognizing the state of Israel. In 1793, the United States had a treaty with France regarding amity and commerce. France lost their stability in government when the people beheaded Louis XVI. Washington used his Recognition power to continue to recognize the French Republic as a player on the world stage despite their lack of a stable government, thus keeping the treaty in action. In 1917 the Balfour Declaration was proposed. This document brought forth the idea in reference to declaring Palestine a Jewish state in repayment for their support of the British in World War I. This angered the Arabs that were already in Palestine, so Britain and the United States created the Anglo-American Committee of Inquiry, which in 1946, decided that following through with this declaration was a bad idea. In 1947, United Nations Resolution 181, ended up defining the outline of Palestine creating a separate Jewish and Palestinian state. This Resolution divided the area into three entities: a Jewish state, an Arab state, and an international zone around Jerusalem. President Truman then recognized this new state of Israel as a Jewish state on May 14, 1948.

Yet despite all of these examples describing the past Presidents enforcing their Recognition power, the act that Congress had passed only a few years ago was not turned down. When The Foreign Relations Authorization Act was passed into law, President Bush issued a statement expressing the view that Section 214 was simply advisory because of the fact that a congressional command to change United States policy on Jerusalem would "interfere with the President's constitutional authority to formulate the position in reference to the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." Yet still it was signed and placed into action. The president alone holds the power to recognize a country as a player. But, the law also allows for our nation's system of checks and balances. The President holds his powers, as does Congress. They both have the ability to check in on each other to keep themselves accountable and doing what is in the best interests of the country. In 1790 Thomas Jefferson wrote that "The transaction of business with foreign nations is executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly." This statement exemplifies the fact that even though the President has full power of recognition, there are ways around it through checks and balances if the Congress convinces the court that it should be.

The President is the same as any of us. He has to follow the law in the same way that we do. If anything, the President most likely has more laws that affect him. With that said, yes the President's recognition power is subject to laws enacted by means of Congress. If Congress passed a law tomorrow saying that it was illegal to do something, and the law was agreed

upon and placed into action, the President would have to abide by that law. This situation is no different. Congress passed an act saying that if a child was a "United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." There's no disputing what this law says. Even if Congress passed a law, the President has the ability to veto it, but then congress can have a two thirds vote and override that veto. And this law, a recognition that one's birthplace is as they grew up to hold it as, does not infringe on the President's recognition power, only in regards to the power in reference to placing words on a document.

Some might say that by allowing the name on the passport to change from "Jerusalem" to "Israel" could fuel the fire towards a greater conflict between the United States and other countries. As a matter of fact, this is one of the main reasons that the President is so unwavering in changing the birthplace. What can I say to this other than the fact that Congress – for as long as United States history has began – has called the shots when it came to war. It is written out in the Constitution in Article 1, Section 8, Clause 11, otherwise referred to as the War Powers Clause that Congress – and Congress alone – has the power to declare war. [The Congress shall have Power...] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water. If the consequences in reference to changing the birthplace on a passport are war, does it make sense to place the President in full power over this and exclude Congress? After all, the legislative branch is the only one allowed to declare, pay for, raise an army for, or provide a Navy for war. This power solely belongs to Congress. Not the President, not the courts. War belongs to Congress, and if war is what the court fears, then the decision is entirely in the legislative branch – specifically Congress' hands. After all, if the President is worried about a war, then this argument would not even fall under the power of recognition really, as opposed to that of a more conventional foreign relations power. In that case, the power would fall into the President's hands. But, as with any political authority there are checks and balances to follow. In order for Congress to make any exercise of its Constitutional powers, they need to be aware of what country places are in. Imagine that Congress declares war on a country. We will forsake propriety and say they declared war on Japan. The President, full recognition power or not, would not be able to justify under the law bombing Laos or Taiwan by claiming that he has decided to turn those countries into Japan. The power of the United States Congress to declare war on other countries involves the power to determine what exactly is a part of said countries and what is not a part of them. If it was seen any other way, the President would be the one calling the shots when it came to war, and any proclamation of war would be his global bank check. To come to the point, Congress, when making decisions regarding foreign matters, is required to make territorial ascertainment about the countries to which it applies to.

Does it not fall the other way as well? The American Heritage New Dictionary of Cultural Literacy notes that the decision for the President not to exercise the power of recognition is,

in a way, the ability for governments to show their objection and disapprobation of other governments. The rejection of the change from "Jerusalem" to "Israel" concerning the anger of other nations, if it ever was a large issue to begin with, could anger foreign countries just as well, could it not? So justifying that the change should not permitted due to the fact that anger could ensue is a nearly illegitimate reason not to follow through on the change in this scenario.

Not only should war over a group of people's passports be a minute focus in occasion of debating this, but Zivotofsky points out that place of birth entries do not carry any foreign policy implications according to State Department surveys of foreign governments, and that following this many other foreign administrations believe that the place of birth on a United States citizen's passport is trivial. Zivotofsky also notes that, in light of some errors in occasion of creating passports, there are, as a matter of fact, people that are at the present time United States citizens who have passports that say they were born in "Israel" and not "Jerusalem", and that the State Department has recognized this. There have been no negative consequences so far, exemplifying that the fear of war is not a large problem to speculate over.

In the end, we the petitioners believe that the decision of this case should lie with the United States Congress under the creation of the Foreign Relations Authorization Act of 2003, which is both Constitutional and encourages a greater nationality from foreign citizens. The law does not infringe on the President's power because of the fact that in many cases such as the ones stated above, there are exceptions to the rule that must allow the interference of Congress. Ultimately in final analysis, in cases such as these where acceptance in reference to recognition of a state is based on the possibilities of beginning a war, the power should lie in the hands of Congress who is the only group that is allowed to call for the declaration of war. Furthermore, there have been cases that show, because of clerical errors, that there are citizens in the United States whose passports have already been changed, and had resulted in no negative repercussions. Therefore, the case of Zivotofsky vs. Kerry should vote in favor of Zivotofsky and the United States Congress.

Table of Cited Authorities

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Wrote Jefferson in 1790: "The transaction of business with foreign nations is executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly."

Article I, Section 8, Clause 11 of the United States Constitution, sometimes referred to as the War Powers Clause, vests in the Congress the power to declare war, in the following wording:

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