

Brief in favor of the respondent in the case of Zivotofsky v Kerry – Connor Reddington Brandon Johnson

Table of Authorities:

United States Constitution Article II Section II and III

Justia United States Law (law.Justia.com)- Presidential Monopoly (Jefferson)

Korematsu v United States

Youngstown Sheet & Tube Co. v Sawyer

Statement of Argument:

We are arguing for Secretary of State John Kerry, in the case of Zivotofsky v Kerry. The power of recognition lies solely with the President and the executive branch. Secretary Kerry acted to deny the recognition of Jerusalem as belonging to Israel in order to exert the power of recognition that belongs to the President of the United States as given to him in Article II Section II and III of the United States Constitution. Secretary Kerry also acted to deny the recognition of Jerusalem as belonging to Israel in order to fulfill the constitutional obligation of the President of the United States to execute the laws in the best interest of the nation's safety and security interests. According to the power of recognition vested upon the President of the United States by Article II, Section III of the United States Constitution and the Constitutional obligation vested upon the President of the United States by article II, Section II of the United States Constitution, Secretary Kerry's actions were not in violation of the United States constitution and the petitioner, Menachem Binyamin Zivotofsky, does not have the constitutional merit to sue Secretary Kerry, President Obama, or the Executive Branch on behalf of a congressionally enacted statute that he claims limits the recognition power of the President of the United States.

Argument:

In order to clarify our argument, we would like to provide some background information concerning the case as well as the Petitioner himself. First, we will talk about the case itself. The precedent for the last 60 years has been for the Secretary of State, acting for the President, not to recognize any country as having control over Jerusalem, even though the city is in the country of Israel. American citizens who are born in Jerusalem have their passports listed as Jerusalem, not Israel according to this policy. In 2002, Congress passed a law that said that the Secretary of State should, if requested, list the place of birth as Israel on passports. Now we will talk about the Petitioner, Ari Zivotofsky, and his family, Menachem and Naomi Zivotofsky. They argue that the precedent set establishes that the President's recognition power is subject to laws enacted by the U.S. Congress. Zivotofsky wants the State Department to change his son's passport's Country of Birth from Jerusalem

to Israel. Secretary of State John Kerry, the Respondent, acting on behalf of the President, argues that the Constitution gives the president alone the right to recognize any foreign state or government. He argues that Congress cannot pass laws that limit or set parameters over the president's recognition power, and therefore cannot pass laws that allow people to change a country of birth on a passport.

The issues before the court are as follows:

What is the recognition power?

What is the scope of that power?

Who holds that power, the President, Congress, or both?

Is the president's power subject to laws enacted by Congress?

Whether a Congressionally enacted statute that directs the Secretary of State, upon request, to record the birthplace of an American citizen born in Jerusalem as born in "Israel" on a Consular Report of Birth Abroad and on a United States passport is unconstitutional on the ground that the statute "impermissibly infringes on the President's exercise of the recognition power?"

The power of recognition is defined in Article II, Section III of the United States Constitution as "power to receive ambassadors and any other public ministers". This section (Article II Section III) embraces not only "all possible diplomatic agents which any foreign power may accredit to the United States" (law.justia scope of "power to recognize"), but also all consular agents, who therefore may not exercise their functions in the United States without an exequatur from the President, the power to "receive" ambassadors, et cetera includes furthermore, the right to refuse reception, to request their recall, to dismiss them, and to determine their eligibility under the laws of the United States. This power affords the President the responsibility of being the sole mouthpiece of the nation in its dealing with other nations. Thomas Jefferson wrote in 1790 in *The Presidential Monopoly*: 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. To address whether Congress has the power to interfere with the president's recognition powers, the answer is no. Because the president is the sole mouthpiece of the nation in its dealing with foreign nations, Congressional legislation cannot impact this power. This power includes the receiving of official documents with regards to immigration from other nations. Congress can write and pass laws, but due to the indoctrination of the separation of powers principle, Congress cannot execute the laws. Therefore, the Congress can pass a law, but cannot interfere with how the President executes the law. The sole power to recognize falls under the laws. Therefore, Zivotofsky has no constitutional merit with which he can sue the Secretary of State John Kerry, the President of the United States Barack Obama, or the Executive Branch

as a whole.

In addition to the issue of executive recognition as a Constitutional power of the Executive Branch, that denies the merit of Zivotofsky to sue Secretary Kerry on Constitutional grounds, there is also the issue of National Security that lies within the reasoning of Secretary Kerry's refusal to recognize Jerusalem as of the state of Israel. According to Article II Section II of the United States Constitution, "The President shall be Commander in Chief of the Army and Navy of the United States..." which burdens him with the obligation of executing the laws in the best interest of the National Security of the United States. In the city of Jerusalem, there are many faiths that lay claim to the city as a holy site. Specifically the populations of Christians, Jews, and Muslims lay claim to the city. By explicitly claiming that one religion, in this case the Jews, the majority population of Israel, has sole autonomy over the city of Jerusalem, the country of Israel could be become a place of civil war and could destabilize a country, a city, and a region that is vital to our economic and security interests. In the case of *Korematsu v. United States*, the executive branch's actions in regards to national security was at issue. In the final ruling, in a 6 to 3 decision, the United States ruled in favor of the United States citing that the actions of Executive Order 9066 was Constitutional on the grounds that the government was able to argue that the internment of Japanese Americans was vital to the national security interests of the United States. While the decision to intern Japanese Americans was a moral injustice, the Constitutional obligation of the President to act in the interest of national security was and always should be upheld. In the case of *Youngstown Sheet & Tube Co. v. Sawyer* the executive actions of a president in the name of national security were also at issue. President Harry S. Truman issued an Executive Order directing the Secretary of Commerce to take over the steel mills, which would prevent a strike by the United Steelworkers of America, a strike which could have sharply reduced steel production, which at the time was needed for the Korean War. In a 6 to 3 decision, the Supreme Court ruled against the government ruling that the President did not have the authority to take over the Steel Mills. However in a special concurrence, Justice Clark held that the President does have the right to act on behalf of national security. While the case of *Zivotofsky v. Kerry* is not dealing with the issue of interning Japanese Americans in internment camps nor is it dealing with the issue of taking over the nation's steel mills, all three cases involve the President acting on behalf of national security interests an obligation that has been established in Article II Section II of the United States Constitution. In the case of *Zivotofsky v. Kerry*, it was in the National security interests of the United States to declare Jerusalem through all of its foreign actions as a separate entity that harbors all religions and ethnicities, with no group having autonomy over it. By recognizing Jerusalem as belonging to Israel in an act as minor as recognition of a passport could potentially exacerbate an already tense area, which could potentially if altered, cause a threat to the nation. The idea of causing more friction in an already dangerous area does not seem worth it.

Conclusion:

In conclusion, Secretary Kerry acted in the name of power and responsibility. Under Article II Section III of the United States Constitution, Secretary Kerry acted under the power of the president of the United States by recognizing the sovereign city of Jerusalem as independent of any ethnic or religious claims upon it by the multitude of groups in the city of Jerusalem. This recognition of the city of Jerusalem as an independent entity and not recognizing it as a part of Israel was within the President's power to recognize "ambassadors and any other public ministers". This power to recognize is the sole power of the President, as the president is the sole mouthpiece of the nation in dealing with other nations. The scope of this power includes only "all possible diplomatic agents which any foreign power may accredit to the United States" (law.justia scope of "power to recognize"), but also all consular agents, who therefore may not exercise their functions in the United States without an exequatur from the President, the power to "receive" ambassadors, et cetera includes furthermore, the right to refuse reception, to request their recall, to dismiss them, and to determine their eligibility under the laws of the United States. This power rests only in the executive branch and due to the indoctrination of the separation of powers, the Legislative branch cannot interfere with this power through legislation. When Secretary acted under responsibility, he acted under the President's responsibility as the "Commander and Chief" (Article II Section II), to deny the claim of any ethnicity or religion over the city of Jerusalem in the national security interests of the United States. In the case of *Korematsu v. United States* in which the President of the United States issued an executive order to intern Japanese Americans in the interests of national security, the Supreme Court ruled with the government upheld its power to act in best interest of the national security of the United States. In the case of *Youngstown Sheet & Tube Co. v. Sawyer*, the government again acted to close the steel mills in the interests of national security. Although the Supreme Court ruled against the government, Justice Clark in a special concurrence ruled that the President has the power to act on behalf of the best interests on national security. These two cases do not address the power of recognition, however these two cases do address the reason Secretary Kerry, on behalf of the President, decided not to recognize Israel as a part of Israel. And that reason is that Secretary Kerry acted under the best national security interest of the United States of America by maintaining a stable situation that if recognized the other way, could have resulted in a grave assault on the national security interests of the United States in Israel. These two justifications, power and responsibility deny the merit of the petitioner Menachem Binyamin Zivotofsky to sue the Respondent John Kerry on the grounds that the President's power of recognition is subject to Congressional legislation. And because the petitioner does not have the Constitutional merit to sue Secretary Kerry then the Court should rule in

favor of the respondent Secretary of State John Kerry and the President’s power of recognition.

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