

Brief in Favor of the Petitioner in the case of Zitovotfsky v. Kerry- Brendan O'Neill and Dominique Parker

Table of Cited Authorities

-Article II, §2, Cl. 2 of the United States Constitution

-The Federalist No. 69 (Alexander Hamilton)

-Thomas Jefferson, Opinion on the Powers of the Senate Respecting Diplomatic Appointments

Statement of Argument:

The President acts simply as a figurehead or mouthpiece for the United States government, and holds far less power than the legislative branch, namely Congress. Congress holds the power to make laws while the purpose of the executive branch is to enforce the law or proclaim it, not to create it. In terms of recognition power, which is the power to diplomatically and politically acknowledge the sovereignty of another state, it is the jurisdiction of Congress to recognize other states. The scope of recognition is limited, and only pertains to the United States government, and can not be done lightly, as it can change the political balance of the world. The President is subject to all laws of Congress, as is anyone else. This was intended by the Founding Fathers in their creation of the Constitution in order to specifically limit the power of the executive to prevent the rise of another tyranny. It is entirely Constitutional for Congress to impose a statute to direct the Secretary of State to record the birthplace of an American citizen born in Jerusalem as being born in Israel, as it does not recognize Jerusalem as politically belonging to Israel, only recognizing the geographical location of Jerusalem as being located within the borders of Israel, thus not infringing on any political powers of recognition, as no official recognition is occurring.

Argument:

A US citizen, Menachem Zivotofsky, requested that his son, who was born in Jerusalem, be listed as being born in Israel on his passport. Secretary of State John Kerry refused to change the passport, claiming that the statute demanding that he should is an infringement on the recognition power of the President by Congress. The recognition of power encompasses

the power of the United States government to politically acknowledge another political entity as a state, allowing the two governments to have formal discourses and create treaties, and otherwise treat the recognized entity as an official state. The scope of this power is limited by Congress and laws passed by Congress. If the President were able to recognize any political entity by himself, he would have the colossal power to practically create countries without limitation with the power behind the United States recognition. It is entirely necessary for Congress to be able to limit the power of the executive to the point that he cannot recognize any entity without the consent of Congress. According to Article II, §2, Cl. 2 of the United States Constitution, “[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors[.]”. It is specified with every power given to the President in terms of foreign powers and influence, that he requires the consent of the Senate. The executive cannot have power unlimited by the legislative branch, as that would fly in the face of the ideals of our republican government. This country was built on the principle of the sovereignty of the people, not of the executive. The purpose of the legislative branch is to represent the will and interests of the people through creation of law. The executive branch was simply created to put that law into practice and enforce it. The Congress was meant, by the Founding Fathers, to be the ultimate power in the land, and to limit the possibility of a tyrant rising to power. Thus, would it not be prudent to assume that the power of recognition should also lie in the jurisdiction of Congress? The intended power of Congress, especially in respect to the executive branch and the President specifically, would suggest that the power to recognize would coincide with the power to create legislature and law.

According to Alexander Hamilton in the Federalist Number 69, “The President is also to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority.”, illustrating the role of the President as a mere figurehead for the United States government, not the ultimate power. As a mere figurehead, he is entirely limited by the power of Congress. Therefore, Congress must hold the ultimate power of recognition, as such an influential power cannot be trusted to one man, even one as important as the President. While the President may possess power domestically and as almost an ambassador himself in meeting with foreign leaders, it is left to Congress to make the important decisions concerning foreign affairs. Jefferson wrote in his Opinion on the Power of the Senate Respecting diplomatic appointments that “The Constitution itself indeed has taken care to circumscribe this one within very strict limits: for it gives the nomination of the foreign Agent to the President, the appointment to him and the Senate jointly, the commissioning to the President. This analysis calls our attention to the strict import of each term. To

nominate must be to propose: appointment seems that act of the will which constitutes or makes the Agent: and the Commission is the public evidence of it.” In this school of thought, the President has the power to propose and proclaim, but must relinquish the power to create partially to the Senate. Therefore, the President does possess power in the United States government, and while to foreign nations his purpose is to act as a figurehead, he does still have the power to make a difference. However, in the end, the President must be regulated by the legislative branch in order to retain his domestic powers. The President simply possesses the power to politically recognize states with the consent of the legislative branch, which ultimately places the power in the hands of the Congress.

The entire purpose of the executive branch is to act as the face of the United States government and to exercise the power of the government not as his own entity, but as the physical vessel for the power of the executive branch. The executive branch exists to enforce the laws of the United States and project American values to the rest of the world through foreign relations and diplomacy. The power of the executive branch and the executive himself is therefore limited by the creation of laws that determine those American values and goals, which is performed exclusively by the legislative branch, namely Congress. If the executive were to not be limited by laws imposed by Congress, he would be free to impose his will and personal visions on the country domestically and throughout the world by projecting his views diplomatically through foreign relations with other countries. It is necessary for Congress to pass laws in order to check the individual power of the President to prevent his power from growing to unmanageable levels, and to preserve the balance of power of the United States government domestically and abroad. The entire purpose of having multiple branches of government is to prevent the rise of tyranny from any one source, specifically the executive branch, due to the founding father’s past experiences with a monarch and Parliament. Therefore, it is entirely Constitutional and necessary for Congress to be able to limit the powers of the President and the executive branch.

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 not at all unconstitutional. The passing of a statute does not qualify as officially recognizing Jerusalem as a state, or recognizing Israel as having a political claim to Jerusalem. If this were to occur in any country other than Israel and any region more stable than the Middle East, this would simply be an issue of clearing out a bit of red tape, not a case that questions the power of the legislative branch and the President through the Constitution. This law is only sensitive because of the current political situation in a highly contested and unstable area, hence all of the tiptoeing and refusal to make a real decision. The Supreme Court should not make a great and all-binding decision to the fundamental document outlining the law of the

United States based on such a fleeting and incredibly situational issue. This is simply a statute passed in respect to a person's cultural and religious identity, and has no intended political impact. An Israeli national or Jew who wants to identify with Israel would want to be listed as being born in Israel. Congress passed this statute to appease those who want to be identified as being born in Israel, due to national pride or religious motivations, and not in an attempt to recognize a political entity or limit the President's power to do so. This is only a law concerning documentation and personal belief and desires, not a political statement or power grab by Congress. As a country that preaches about its offered equality and freedom, it would be hypocritical to refuse anyone personal fulfillment, religious or otherwise, due to a small technicality like being born in a politically "inconvenient" area or nation. The religious turmoil in the area should not hamper the ability of one to record their place of birth as Israel, since Jerusalem is undisputably located geographically in Israel. All political and religious conflict aside, this issue is based on the government's need for subtlety or need to ignore an issue in the Middle East conflicting with what seems to be a simple issue of personal freedom and religious pride. Therefore, even if the ultimate power of recognition were to lie solely in the hands of the President, it would be irrelevant, as this is not an issue of political recognition. A law passed for the convenience of those wishing to identify with their "holy land" or state of origin is not a political issue of official recognition. Therefore, there is no basis to deny Zivotofsky his request, as it raises no significant political issues in terms of infringing on the President's power to recognize. If this were to be a political issue, it would be over questions such as how the sovereignty of American soil clashes with that of the occupied country, such as US bases in Japan and Germany being counted as US territory, yet existing is a separate recognized state. That issue applies to this specific instance in that the US may need to clarify how it handles the clarification of nationalities based on geographical location rather than political circumstance. However, the request made by Zivotofsky to simply list his birthplace, in a geographically correct, if politically murky way is in no way an issue based on the power of political recognition, and therefore there is no reason for Zivotofsky's request to be denied based on an issue of political recognition and the usurping of power from the executive branch by the legislative branch.

Conclusion:

All in all, the power of recognition rests in the hands of the President, but he can be limited entirely by Congress, so that the ultimate power rests in the hands of the legislature. The President has the power to recognize a state, but in turn Congress has the power to refuse and limit his decisions to prevent the executive from holding such a huge power alone. In the end, however, this case has little impact on these statements. No state is being recognized, no rights or powers are being infringed upon, and Zivotofsky's request remains

entirely legal and Constitutional, and brings up no political issues that deserve any kind of denial by Secretary of State Kerry. Kerry lacks any basis in his denial of Zivotofsky's request, and therefore Zivotofsky should be allowed to have his place of birth listed as Israel, as the only purpose of his request was personal and religious motivations, with no political intent or meaning.

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