

Brief in Favor of the Petitioner in the case of Zivotofsky v. Kerry- Toni DeGraff and Sara LaFleur

Zivotofsky v. Kerry

The authority of the President, as well as Congress, seems clear to most citizens. Congress “enacts laws and declare(s) war” and the President is in charge of “implementing and enforcing the laws written by Congress and, to that end, appoints the heads of the federal agencies” as well as “conducts diplomacy with other nations”, holding “the power to negotiate and sign treaties”. The case of Zivotofsky v. Kerry questions the rights that the Presidents holds, over the rights that Congress holds, all in terms of foreign relations. Although there is an even distribution between the responsibilities that either branch has in the case of recognizing foreign states, the President holds all jurisdiction over the matter. The Constitution granted the President with the executive authority to “appoint Ambassadors” and “receive Ambassadors and other public Ministers” in 1791, and the same rights are designated to the President today.

Recently, the Zivotofsky family, the petitioners in this case, have sued the Secretary of State, who is representing the President, asking for the right of their son’s birth certificate to say “Jerusalem, Israel” rather than only “Israel”. Currently, the tensions in Israel and Palestine has left the United States neutral, picking neither the side of Israelis, nor Palestinians. Both want omnipotence over the Holy Land, and both countries claim Jerusalem as their capital city. The President refuses to enforce either idea and based on past cases as well as the Constitution, the President holds authority in this situation without the permission of Congress.

“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... a neutral nation may very properly withhold its recognition of the supremacy of either party, or of the existence of two independent nations; and on that account refuse to receive an ambassador from either.” In 1948, Israel, which was once the British Mandate of Palestine, gained its independence as an its own nation. The creation of the state of Israel has caused great economic, social, and political conflict all around the world, especially in recent years. The controversial

creation of the country caused the bifurcation, or the “[division] into two branches or parts” of Jerusalem, a holy city and currently the capital of both Israel and Palestine. Due to this debate over where the city resides, the thousands of babies born in the holy city have “Jerusalem” written on their birth certificates as their birth place, with no country listed. On October 17, 2002 Menachem Binyamin Zivotofsky, a U.S. Citizen, was born to Ari Z. and Naomi Siegman Zivotofsky in Jerusalem, Israel. When Menachem’s parents discovered that his birth certificate only said “Jerusalem”, rather than including Israel, they applied to the Consular Report of Birth Abroad and for a United States passport which would include his home country of Israel as well. When officials explained that the State Department requires that the birthplace of Jerusalem is written with neither the country of Israel or Palestine, his parents filed suit against the Secretary of State. The DC District Court denied the request, claiming the Zivotofsky family had no standing, but the DC Court of Appeals reversed their dismissal and decided that the family had standing as well as rights to sue the government. After this was brought to court once again, the State Department reiterated to the Zivotofsky family that if they were to record “Israel” as the son’s home country, it could compromise United States international affairs with the current Israeli-Palestinian conflict. If the United States even insinuates that they agree that Jerusalem is the Capital of Israel, it can be assumed that the United States favors Israel in the conflict; all of which would lead to irreversible damage between nations. To stay neutral on the topic, the Executive Branch of government continually states that “Jerusalem” will be the only location on the birth certificates of children born there. Upset about this, the Zivotofsky family brought up the case, this time against John Kerry, Secretary of State, who will speak on behalf of the President. The issue is now fundamentally deeper, for it questions the authorities of President and Congress. In this case, the member who holds the power to recognize whether “[the United States] commits itself to treat an entity as a state or to treat a regime as the government of a state” is the Executive Branch. In addition, the Executive Powers are not subject to any laws enacted by Congress that would prohibit the President’s recognition of power. Congress, according to the United States Constitution, “shall have the Power To regulate Commerce with foreign nations... have the Power To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standards of Weights and Measures... shall have the Power To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations... have the Power to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water” compared with the President’s powers aligned in the Constitution of “Commander in Chief of the Army and Navy of the United States...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... shall receive Ambassadors and other public Ministers” in terms of foreign relations.” “Ambassadors and other public ministers” applies to “all possible

diplomatic agents which any foreign power may accredit to the United States”. The President’s power to ”receive” ambassadors includes the blatant right to refuse to receive them, indeed recognize them as countries, even consider their capitals as their capitals, seen in this trial. This idea of the recognition power makes the President and Executive Branch the sole speaker of the nation when dealing with other nations. At no point in the Constitution did it explicitly lay out the recognition of power that the Legislative and Executive Branches hold when compared to one another, only the powers vested separately in each branch. Now one must look at various constitutional figures in history, who explain that although the President and Congress have powers of equal importance, they have jobs that must be defined and established differently when dealing with foreign entities. In the case of foreign relations such to that of defining Jerusalem as a governmental entity of Israel rather than Palestine, the United States Constitution has expressly vested the Executive with power to receive ambassadors, and other ministers. It has not specifically vested Congress with the power, either to repudiate, or acknowledge them. As Joseph Story clarifies, “at all events, in the case of a revolution, or dismemberment of a nation, the judiciary cannot take notice of any new government, or sovereignty, until it has been duly recognised by some other department of the government, to whom the power is constitutionally confided”. Therefore, Congress does not have the right to create or pass bills that recognize Jerusalem as a entity of Israel rather than of Palestine. In fact, there lacks necessity for the President to

in the case Zivotofsky v. Kerry, the respondent is correct. The President can decide on his own whether or not the child’s birthplace written on his passport is Israel or Jerusalem.

In order to stay completely neutral on the controversial debate occurring in Israel and Palestine at the moment, the President of the United States has chosen to enforce his recognition in power. He recognizes that neither Israel nor Palestine has sole jurisdiction over their capital city of Jerusalem, and he will not allow for a country to be written on the birth certificate of those born in Jerusalem. One may inquire if the President holds such power, but it is clear that he does. Despite Congress’ authority over foreign money and commerce, along with declaring war, the President has the power to receive or deny foreign ambassadors. This gives him the right to receive or deny nations, which other Presidents have done in the past for similar reasons. The President serves as the “soul mouthpiece of the nation when dealing with other nations”, for “the transaction of business with foreign nations is executive altogether” according to Jefferson in 1790. Jefferson, confronted with a French Envoy who wanted to work through Congress, was told that only he, ”as the President was the only channel of communication between the United States and foreign nations” the exchange was to be sent “from him alone”.

The problem with the outcome of this decision though is that it would require the President to publicly take a stand on the issue of the 60-year conflict between Israel and Palestine. Many Presidents have avoided this conflict because there are more immediate and pressing issues for the President to address on a national scale. The Israeli-Palestinian conflict involves religious disagreements and beliefs and the United States government is against choosing one side over another.

This conflict has been referred to as the world's "most intractable conflict". The main issues are currently still: mutual recognition, borders, security, and control of Jerusalem. The idea of a two-state solution making Israel and Palestinian each their own states have been well liked but each side is skeptic of the others commitment to uphold obligations and agreements that come with creating separate states.

If the President were to allow the Zivotofsky family to change their son's passport to say he was from "Jerusalem, Israel" he would be in a way forcing the division of the country by recognizing the two as separate states from each other. Given that the issue is being dealt with on a global level, and although it is in the President's power to make the decision of whether or not he will recognize the states, it is an unethical choice for him to make.

In the case of *Zivotofsky v. Kerry*, the defendant, John Kerry, who will be speaking on behalf of the President of the United States will have to make that choice. While the President has power to decide whether or not he wants to recognize Israel and Palestinian as separate states, without having to consult with Congress, it is against the United States best interest to do so. By recognizing the two as separate states it could compromise the United States' stance on global issues, which is said to be neutral. It is an intelligent decision on the United States' part considering their recent involvement with the ongoing issue of ISIS. Because the United States is so involved with conflicts still in the Middle East, it's understandable as to why the President is deciding to stay neutral on other global political issues, especially this one that has been fought about for over 60 years. Considering the fact that the conflict in Iraq is being combated with airstrikes and by executions of prisoners, with the history of the conflict in Jerusalem spanning over six decades, who knows what the outcome of just a small decision on America's part. Worst-case scenario, it could cause war, something that at this time, given the United States involvement in other global issues, can't possibly be dealt with by America because all of our war efforts are currently in the Middle East.

In the case of *Zivotofsky v. Kerry*, the prosecution side will be fighting that their religious beliefs should be recognized in the United States by the changing of their sons birthplace on his passport. The defense though, will argue that although it is in the power of the President to make the decision to change the passport, it is not in America's best interest. The

president's sole job is to execute and pass bills that U.S. citizens will benefit from and that will cause the least amount global upheaval. As stated before, the United States government believes it's in their best interest to stay neutral on as many foreign affairs as they can. This allows them to concentrate on one issue at a time. Consequentially, it is unlikely that Zivotofsky will win the case presented. Again while it is in the president's power to act in Zivotofsky's favor, it is not in America's best interest for him to do so.

Sources cited:

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