Zivotofsky v. Kerry: A Study in Law, Politics, and Foreign Affairs

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Every once in a while, a seemingly mundane, everyday dispute morphs into a constitutional case of major proportions. This is exactly what happened when the parents of Menachem Zivotofsky, a U.S. citizen born in Jerusalem, asked the U.S. Embassy in Tel Aviv to write “Jerusalem, Israel” on his passport. With this apparently modest request, the Zivotofskys, knowingly or not, wandered into a thicket of constitutional law, politics, and foreign affairs.

It turns out that the U.S. State Department prohibits the designation of “Israel” as the place of birth on the passport of a U.S. citizen born in Jerusalem, pursuant to the long-standing policy of the executive branch to remain neutral on the status of Jerusalem. But it also turns out that Congress enacted a law that required the State Department to designate “Israel” on such a passport anytime the applicant requested it. But then it further turns out that President George W. Bush, who signed that law, issued a signing statement saying that he wouldn’t enforce it because the provision was unconstitutional.

Are you dizzy yet?

If all this weren’t complicated enough, the underlying problem, the status of Jerusalem, is one of the most hotly contested issues in one of the most hotly contested disputes of our time. Indeed,
the U.S. government says that the status of Jerusalem is “one of the most contentious issues in recorded history.” That may be something of a hyperbole, but you get the point: this is serious business.

Zivotofsky v. Kerry raises all these problems and more. It’s not the most usual fare for the Supreme Court, admittedly not expert in foreign affairs. But nevertheless, the case, to be decided in 2015, could alter the power dynamics between the executive branch and Congress on an important matter of foreign affairs; and if the State Department is right, it could throw a match into a highly flammable situation between Israelis and Palestinians.

Background
Menachem Zivotofsky was born on October 17, 2002, at Shaare Zedek Hospital in Western Jerusalem. Menachem’s parents, Ari Z. Zivotofsky and Naomi Siegman Zivotofsky, are United States citizens, so under U.S. law Menachem was a U.S. citizen, too. Naomi visited the U.S. Embassy in Tel Aviv on December 24, 2002 to apply for a U.S. passport for Menachem. She asked that the State Department designate “Jerusalem, Israel” as Menachem’s place of birth.

The State Department denied Naomi’s request, citing its regulations in the Foreign Affairs Manual, or “FAM,” which directed the State Department to list only “Jerusalem” as the place of birth for any U.S. citizen born there. The FAM specifically says, “Do not write Israel or Jordan” on the passport. The FAM also says that Israel “[d]oes not include Jerusalem.”

These regulations at the State Department reflect the long-standing position of the executive branch. U.S. presidents starting with President Truman in 1948, the year of the creation of the State of Israel, have consistently maintained a position of strict neutrality on the question of sovereignty over Jerusalem. The Secretary of State summarized it this way in the lower court:

Within the framework of this highly sensitive, and potentially volatile, mix of political, juridical, and religious considerations, U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel.

Still, Menachem’s parents wanted “Israel” listed on his passport, and they cited legal authority of their own, in particular, the Foreign Relations Authorization Act, which Congress passed in 2002. That Act included Section 214, titled “United States Policy with Respect to Jerusalem as the Capital of Israel.” Among other things, the Section directed the State Department to record “Israel” as the place of birth on a passport of a citizen born in Jerusalem, if the parents or guardians of a U.S. citizen born in Jerusalem so requested. But the legal validity of this provision was hotly disputed. President Bush signed the Act, but he also issued a signing statement objecting to Section 214, which read:

Section 214, concerning Jerusalem, impermissibly interferes with the President’s constitutional authority to conduct the Nation’s foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President’s constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.

A signing statement is a declaration upon the president’s signing of a bill that indicates how the president intends to enforce the bill. Presidents do not simply veto the entire bill (which seems like a more obvious way to address the problem), because they like most other provisions of it, and because the entire bill may have been the result of a grander political compromise that could not be recreated. So these signing statements might operate like a behind-the-scenes line-item veto, even though a statutory line-item veto is unconstitutional. The Supreme Court has never ruled on the constitutionality of these signing statements, and President Bush’s signing statement is not specifically at issue in this case.

The Arguments
At its core, this case is about the respective powers of the president and Congress to say what place-of-birth designation can go on a U.S. passport. On the one hand, the president has broad authority to issue and regulate passports as part of the president’s power to conduct foreign affairs. After all, a passport is an official diplomatic note, from one sovereign government to another, vouching for the citizenry of the holder and titling the holder to certain protections of the issuing government. Even more relevant to this case, the president has authority under Article II of the Constitution to recognize foreign states and their governments, including the territorial limits of their sovereignty. This authority derives from the Reception Clause, which gives the president the power to “receive Ambassadors and other public Ministers.” But the Constitution does not specify the precise extent of this authority. In particular, it does not specify whether the president enjoys exclusive recognition authority, or, instead, whether the president shares this authority with Congress. The Supreme Court has never ruled on this question.

The Constitution also grants Congress
some authority to regulate passports. This authority derives from Congress's power over foreign commerce and naturalization. As with the recognition power, however, the Constitution does not specify the full extent of this authority. And, as with the recognition power, the Supreme Court has never ruled on this question.

This case thus pits the president's power over passports, including the president's authority to conduct foreign affairs and the president's recognition authority (exclusive or not), against Congress's authority over passports, including its own recognition authority (if any).

In sorting out separation-of-powers questions like this, the courts use Justice Robert Jackson's three-part framework, which he outlined in his concurrence in *Youngstown Sheet & Tube Company v. Sawyer* (1952). First, “[w]hen the President acts pursuant to an express or implied authorization of Congress his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” Second, “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which the distribution is uncertain.” Third, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” This case falls into category three. But that hardly answers the question; it only gives a framework to argue about it.

The core issue—how the passport authority is divided between the president and Congress—has two dimensions, and they form the basis of the parties’ arguments in the case. First, the parties dispute the significance of the place-of-birth designation on the passport—whether it is simply to identify the passport holder, or whether it has broader foreign policy significance, that is, as official United States government recognition of a foreign sovereign. The Zivotofskys say that the designation only reflects the passport holder's identity, and that the passport holder should be able to designate his or her place of birth (or self-identify) as he or she wishes. They point to precedent in a 1994 congressional act allowing U.S. citizens born in Taiwan to designate “Taiwan” on their passports, even though the U.S. recognized Taiwan as part of China. And they say that Americans born in other parts of Israel and areas under Palestinian control already have flexibility in designating their place of birth (in the “Gaza Strip,” or “West Bank,” or even “Palestine,” under certain circumstances), so Section 214(d) only gives that equal opportunity to Americans born in Jerusalem.

The Zivotofskys also point out that enforcement of Section 214(d) would have only a negligible impact on American foreign policy, affecting only 50,000 U.S. passports. But they claim that even if Section 214(d) did impact U.S. foreign affairs, that is no bar, because Congress frequently legislates in ways that affect U.S. foreign affairs.

The Obama Administration counters that the place of birth designation on a U.S. passport is directly related to foreign affairs, and that Section 214(d) impermissibly interferes with the president's exclusive power in that area. The government says that a passport is an official government diplomatic note, and that a place-of-birth designation of “Jerusalem, Israel,” or just “Israel,” would send a signal to all the world that the United States now recognized Jerusalem as part of Israel. The government claims that this signal would seriously damage the sensitive negotiations in the region, and thus affect U.S. foreign policy.

In the second, more difficult, dimension, the parties of the case dispute the constitutional separation of powers—whether the Constitution gives the exclusive power to recognize foreign sovereigns to the president, or whether Congress also plays a role in foreign recognition. The Zivotofskys argue that even if Section 214(d) speaks to recognition of a foreign state, it does not infringe upon any exclusive presidential power. They point out that the Constitution confers no explicit “recognition power” on the president (and certainly not an exclusive power); instead, the Constitution confers only the power to receive ambassadors.

The Obama Administration counters that the Constitution grants the president the exclusive power to recognize foreign states and their governments, as well as the territorial limits of their sovereignty. The government says that the Reception Clause was understood by the framers to include the recognition power, and that other provisions in Article II reinforce the president's recognition power by granting the president broad authority to conduct the Nation's foreign relations—including the sole power to determine whether, and with which foreign states, to establish diplomatic relations or to negotiate a treaty. The government claims that the Constitution makes no provision for Congress to participate in the president's recognition decision, or to override the president's decision.

The Obama Administration argues that Section 214(d) impermissibly encroaches on the president's exclusive recognition power, and, worse, does so “at the behest of individual citizens seeking to express their personal views on what the Nation's position should be.” The administration says that while Congress may enact passport legislation to advance its enumerated powers over foreign commerce and naturalization, Section 214(d) is not related to Congress's enumerated powers. Finally, the administration says that Section 214(d) would “force the Executive to convey to foreign sovereigns that—contrary to the President's longstanding recognition position—the United States has concluded that Israel exercises sovereignty over Jerusalem.” The administration contends that this would create uncertainty in the U.S. position and undermine the president's credibility and his conduct.
of sensitive foreign affairs.

**Oral Arguments**
The Court held oral arguments for the case on November 3, 2014. The Justices were unusually candid in their positions in the oral arguments in *Zivotofsky*, and the arguments gave a glimpse of how the Court is likely to split, and what the Justices’ concerns are.

Most notably, the Justices seem likely to divide along conventional ideological lines in a closely divided ruling. The Court’s progressive wing was unabashedly supportive of the administration, while the Court’s conservative wing was equally unabashedly supportive of *Zivotofsky*. (Justice Thomas was silent, however, as is his practice.) On the progressive side, Justice Sotomayor was perhaps the most aggressive, saying at a couple of points during oral argument that Section 214(d) propagated a government “lie,” in that the United States was “being asked to put on the passport” the place of birth as Israel, but the executive branch of the U.S. government considered the place of birth to be Jerusalem and not Israel. On the conservative side, Chief Justice Roberts was at times the most aggressive, going so far as suggesting that the government’s worry about the impact of Section 214(d) was only a “self-fulfilling prophecy.”

The Justices, in their candor, also revealed their concerns. On the progressive side, Justices seemed concerned that a single U.S. citizen could so dramatically affect U.S. foreign policy, simply by requesting a particular place-of-birth designation on the passport. Progressive Justices also expressed concern that the Court, in all its lack of expertise over foreign policy, could trump the considered judgment of experts in the State Department. On the conservative side, Justices seemed sympathetic to the idea that the place-of-birth designation existed only for identity purposes. They also seemed to question the authenticity of the government’s position of neutrality, given that the government seems to recognize Israeli sovereignty over Jerusalem in other ways (for example, by recognizing Israel’s authority to issue birth certificates for U.S. citizens born in Jerusalem, or by recognizing Israel’s authority to enforce ordinary criminal law against U.S. citizens in Jerusalem).

Justice Kennedy alone seemed to seek a compromise position. He suggested at several points that the government might enforce Section 214(d), but add a line to the passport saying that the place-of-birth designation does not reflect U.S. foreign policy. But this didn’t sit well with the government, because it would undermine the credibility of the executive branch.

**Implications**
This case gives the Court a relatively rare opportunity to consider how the powers of the president relate to the powers of Congress. In particular, this case gives the Court its first opportunity to rule on the precise extent of the president’s recognition power, and to say whether that power is exclusive, or whether it is shared with Congress (and, if so, to what extent). The answers to these questions could have significant consequences well beyond the place-of-birth designation on a passport. Indeed, the answers could have significant consequences on the way the president and Congress interact on other questions of foreign-state recognition and foreign affairs more generally.

On the other hand, the case could turn on a much narrower, much more

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**Timeline**

1947 — The United Nations partition plan for Palestine (Resolution 181) envisions separate Jewish and Arab states while creating a “special international regime in the City of Jerusalem.”

1948 — The British Mandate for Palestine expires on May 14. The Jewish Agency declares itself a provisional government of a sovereign Israel. President Harry Truman immediately declares that “The United States recognizes … the new State of Israel,” making the U.S. the first country to do so. The first Arab-Israeli War begins the next day and results in the division of Jerusalem, with control of West Jerusalem by Israel and East Jerusalem, including the Old City, by Jordan. Israel makes West Jerusalem its capital, but its decision is not internationally recognized, and other countries, including the U.S., establish their embassies in Tel Aviv, not Jerusalem.

1967 — As a result of the Six-Day War in June, Israel takes control of East Jerusalem and then extends its law and jurisdiction throughout Jerusalem, East and West.

2002 — Provision 214(d) of the Foreign Relations Authorization Act enacted by the U.S. Congress provides that “for purposes of the … issuance of a passport of a United States citizen born in the city of Jerusalem … the Secretary of State may upon request] record the place of birth as Israel.” From Truman forward, however, U.S. presidents have consistently adopted a policy avoiding recognition of Jerusalem as part of the sovereign territory of Israel or any other state. Consistent with that continuing executive branch policy, the State Department’s Foreign Affairs Manual has long directed passport officials to “not write Israel or Jordan” as the birthplace for U.S. citizens born in Jerusalem.
mundane question: How does the place-of-birth designation on a passport affect U.S. foreign policy, if at all?

All things being equal, we might expect the Court to look for the narrowest way to resolve this dispute, so as to avoid creating precedent or potential problems in an area, foreign affairs, where the Court generally lacks relative institutional expertise. But the Court already signaled that it is willing to look at the hard questions in the case when it earlier reversed the lower court and ruled that the case did not present a non-justiciable political question. In fact, this is the second time this case has come before the Supreme Court. The first time, in 2012, the Court merely ruled that the case was justiciable. It did not rule on the merits, or even really telegraph any signals on the merits. And the conservative Justices seemed more than willing at oral arguments to jump into this case with both feet.

Finally, the case could have significant implications for U.S. foreign policy with regard to Israel and the ongoing Israeli-Palestinian conflict. Indeed, the case is seen by some as a proxy battle over the U.S. position with regard to Israeli sovereignty (or not) over Jerusalem. The Supreme Court will likely try to avoid poking this hornet’s nest by focusing on which branch gets to decide, not whether the decision is correct. Still, at the end of the day, the Court will have to say whether the State Department has to designate “Israel” on Menachem’s passport.

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Questions for discussion:

- Do you think U.S. passport holders should have the right to name their own place of birth on their documents (such as “Jerusalem, Israel” rather than “Jerusalem”)?

- How is the “passport authority” related to the “recognition power”? How do you think the passport authority should be divided between the president and the Congress?

- Do you think the Supreme Court should be weighing in to decide this case (as “justiciable”)? Why or why not?

- How do you think the Court will rule in Zivotofsky v. Kerry? Why?

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