

Appellate Lawyer of the Week: Nathan Lewin

TONY MAURO

At age 75, Nathan Lewin still has the knack.

Over the strong opposition of the U.S. Department of Justice, Lewin persuaded the Supreme Court on May 2 to grant review of a case that could have major impact on the power of Congress to influence foreign policy. It could also touch on the validity of controversial presidential signing statements.

The case is *Zivotofsky v. Hillary Clinton*, Secretary of State, asking the Court to uphold a 2003 federal law that directs the State Department, on request, to list Israel as the place of birth on passports for U.S. citizens who were born in Jerusalem.

The issue has touched a nerve with the Obama administration, which said in its opposition to Lewin's petition, "The status of Jerusalem is one of the most sensitive and long-standing disputes in the Arab-Israeli conflict." For the last 60 years, the brief adds, presidents have avoided recognizing Jerusalem as the capital of Israel – or even as located within Israel – lest they "critically compromise" their ability to promote the peace process between Israelis, Palestinians and others. In his May 19 speech on Middle East policy, President Obama referred to the "wrenching and emotional" issue of the future status of Jerusalem.

The justices stepped into this controversy based on Lewin's 12-page petition, less than one-third the length of most Supreme Court briefs.

"I'm a great believer in writing short," shrugs Lewin, who is partner with his daughter Alyza in the D.C. firm of Lewin & Lewin. "In my seminar, I tell kids that there's nothing better than a short petition." Lewin teaches a class on Supreme Court advocacy at Columbia Law School.

Menachem Zivotofsky is "my youngest client," Lewin says. Zivotofsky was born in Jerusalem in 2002, but because both his parents were born in the United States, he is a U.S. citizen. When his mother Naomi applied for a U.S. passport for her son, she requested that his birthplace be listed as Israel. Her request was denied, even though Congress had just passed a budget bill that included a provision directing the State Department to list a Jerusalem-born citizen's birthplace as Israel if requested.

When President George W. Bush signed the bill, he issued a signing statement that said the Jerusalem provision "impermissibly interferes with the President's constitutional authority to conduct the nation's foreign affairs and to supervise the unitary executive branch."

Naomi Zivotofsky was a childhood classmate of Alyza Lewin, and agreed to make a test case out of her passport dispute. The U.S. District Court for the District of Columbia dismissed the case



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as a "quintessential political question" beyond the jurisdiction of the courts. The U.S. Court of Appeals for the D.C. Circuit affirmed, ruling that the statute interfered with the president's Article II constitutional duties to "receive ambassadors and other public ministers," which includes deciding which government is sovereign over a particular place.

But Lewin views the case as "just asking the Court to enforce a statute, not to decide a policy." And the statute, he asserts, is in the category of a "valid passport regulation" that courts have ruled on before. A citizen's place of birth is included in passports, he said, not to make a political statement but rather to help in identifying the passport holder. On the signing statement issue, Lewin said that if Bush opposed the Jerusalem provision of the law, "the proper step is to veto the statute."

Lewin plans to argue the case when it is heard in the fall, a decision his daughter supports. "I would rather hear my father argue" than argue herself, she said.

It will be his 28th appearance before the Supreme Court, in a long career that began in the solicitor general's office 40 years ago under Archibald Cox and Thurgood Marshall. Before that, he clerked for the second Justice John Harlan.

"When Cox argued, it was like he was giving a class," Lewin recalled. "The justices took notes and didn't ask any questions." Though Lewin has not argued before the Court in more than a decade, he knows the Court is "a very hot bench," but it does not faze him. "Part of the fun of getting up there is getting all those questions."

After his government service, Lewin helped found one of the early boutique litigation firms in D.C., Miller Cassidy Larroca and Lewin. One of its alumni, Seth Waxman, became solicitor general and now heads the Supreme Court and appellate practice at Wilmer Cutler Pickering Hale and Dorr. Asked about Lewin's eagerness to take on a Supreme Court case at age 75, Waxman said Lewin is "at once a true mensch, a brilliant and creative mind, and a genuine force of nature."

Lewin left Miller Cassidy when it merged with Baker Botts 10 years ago.

Before and after the move, a significant part of Lewin's workload has been what he calls "Jewish cases," typically involving Orthodox Jews whose practices raise issues under the religion clauses of the First Amendment.

In 1986, he argued in *Goldman v. Weinberger* before the Supreme Court, asserting unsuccessfully that a rabbi in the Air Force should be allowed to wear a yarmulke on duty. Congress changed the law, but related issues remain. Lewin is currently representing an Orthodox rabbi who was barred by the Army from serving as a chaplain because he would not shave his beard – even though some Sikhs have been allowed to keep theirs.

Lewin also argued in the 1989 landmark *Allegheny County v. ACLU*, which resulted in a split vote upholding the display of a menorah on public property, but not a Christian nativity scene. Battles over crèches in town squares are still a seasonal staple.

"People keep calling me" with Jewish cases, Lewin said with mixed emotions. He's glad to be asked, but wishes more Orthodox lawyers were willing to get involved.

During a stint in the Justice Department, Lewin explained, he drafted the feature of the Civil Rights Act that forbids discrimination in the workplace on the basis of religious observance. That, he said, led to "a lot more religiously observant Jews in law firms."

But, Lewin said, "one of the disappointments I've had" is that this influx has not resulted in "a large group of Orthodox Jews ready to take up the cudgel of these cases." Asked why, Lewin shrugged and said, "It's the economics of it. They have families. The profession has turned into a business, and it's not so easy to take on these pro bono cases."

In the Zivotofsky case, for example, Lewin said, "We have not collected a penny. But somebody had to be willing to do it." Lewin said his practice "hasn't been as remunerative as a big law firm, but it's been satisfying." And he'll keep at it as long as he can. Said Lewin, "It's a mistake to retire."

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