JUSTICE

Summer 2014
No. 54

The magazine of the International Association of Jewish Lawyers and Jurists

In this issue

הארגון הבינלאומי של עורכי-דין ומשפטנים יהודים(ע"ר)
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

Zivotofsky v. Kerry: A Historic Constitutional Battle

Nathan Lewin

In the first week of November 2014, I will be privileged to present oral argument in the United States Supreme Court in a case that will immediately affect about 50,000 American citizens, but may have much broader and lasting impact on powers of the President and the Congress under the United States Constitution. The case – now titled *Zivotofsky v. Kerry* – was begun in 2002, shortly after the plaintiff Menachem Binyamin Zivotofsky was born in Shaare Zedek Hospital in Western Jerusalem on October 17, 2002.

Less than three weeks before Menachem's birth, President George W. Bush signed a law that Congress had enacted, granting American citizens born in Jerusalem the right to list their "place of birth" on their U.S. passports as "Israel." The passport provision at issue in this case is part of a larger law entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," in which Congress repeated its desire to "immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." The first three subsections of the law relate to the Embassy location. Subsection (d), however, which is the only section at issue in the *Zivotofsky* case, states that "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."

This provision was designed to change the policy that the State Department had been following regarding American citizens born in Jerusalem. Babies born anywhere in the world to parents who are both United States citizens have American citizenship from birth. And, of course, someone born in Jerusalem may obtain American citizenship later in life. American passports bear date-of-birth and place-of-birth designations. The State Department ordinarily identifies U.S. citizens born outside the United States in their passports by the ***country*** in which they were born. I, for example, was born in Lodz, Poland. My American passport lists "Poland" as my place of birth; it does not mention Lodz.

Asserting that the United States does not recognize any part of Jerusalem as being within Israel, the State Department currently issues American passports to Jerusalem-born U.S. citizens listing the city, "Jerusalem," ***instead*** of the country. No country is named on American passports of American citizens born in Jerusalem. American citizens born in Tel Aviv or Haifa or in any other city within the pre-1967 borders of Israel carry passports that show "Israel" as their place of birth. (A specific exception is made by the State Department for American citizens who were born in Israel but object to showing "Israel" as their place of birth. They may remove "Israel" from their passport and designate their city of birth instead.) The 2002 law was designed to compel the State Department to show "Israel" as the birthplace of any U.S. citizen born in Jerusalem who wants to specify "Israel" as his or her birthplace. Unlike the provision that directs that the United States Embassy be located in Jerusalem, the passport provision gives the President no authority to delay enforcement.

When President Bush signed the law in 2002, his office issued a "signing statement" that declared that the newly enacted statute "impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch." This "signing statement" applied not only to the provision that concerns the location of the embassy. It covered the statutory instruction regarding passports and birth certificates of citizens born in Jerusalem.

One Congressman who was very instrumental in having that law enacted called the office of Lewin & Lewin and said that he wanted us to bring a lawsuit on his behalf to compel the Secretary of State to comply with the law, notwithstanding President Bush's "signing statement." We notified the Congressman that under binding decisions of the Supreme Court, a Congressman did not have "standing" to bring such a lawsuit. Only an individual who was personally denied the right that the law created would be able to bring to an American federal court his or her legal claim to have his or her passport say "Israel" rather than "Jerusalem."

The Congressman urged us to find such a plaintiff. We

knew that the Zivotofskys, both of whom were born in the United States and retained U.S. citizenship after their *aliya*, were expecting the birth of a child who would be delivered at Shaare Zedek Hospital in Jerusalem. When they heard of the new law that gave their baby, whom they named Menachem Binyamin, the right to have a passport recognizing that he was born in Israel, Ari and Naomi Zivotofsky undertook to enforce it. After Menachem was born, his mother applied for a passport at the U.S. Embassy in Tel Aviv and asked that the passport show Israel as Menachem's country of birth. Applying the instruction in the State Department's *Foreign Affairs Manual* that forbids designating Jerusalem as being in Israel, the Embassy rejected her request. Menachem's passport and American birth certificate say that he was born in "Jerusalem" despite the law's directive that pursuant to his parents' request his place of birth be listed as "Israel." And so, at less than one year old, Menachem Binyamin Zivotofsky became our law firm's youngest client.

This *pro bono publico* lawsuit started by our firm in September 2003 has now passed its tenth anniversary. The Department of State first responded to our lawsuit by claiming that Menachem had no "standing" to object to the place-of-birth designation in his passport. After all, they said, he has a valid U.S. passport. What difference does it make how his birthplace is characterized in his passport?

The federal district judge accepted this argument and dismissed our case on the ground that Menachem lacked "standing." We appealed because the law explicitly gave Menachem (or his parents, who spoke for him) the right to have a particular birthplace designation in his passport, and this, we said, gave him "standing" to enforce that legal right in court. In February 2006, a unanimous panel of three judges of the United States Court of Appeals agreed with our position and referred the case back to the lower-court judge.

The district judge had also concluded that our lawsuit presented an issue that American courts cannot decide because it is a "political question." This is a self-imposed restriction on judicial authority that American courts have adopted. Unlike Israeli courts, which have no limitation that prevents them from resolving "political questions," courts in the United States deem "political questions" to be "nonjusticiable" because, they say, there are no "judicially discoverable and manageable standards" for resolving such issues.

In reversing the lower-court dismissal of our case, the Court of Appeals said that discovery should be conducted in the lower court so that the court would have information to decide whether our complaint seeking enforcement of Congress' 2002 law presented a "political question." The State Department acknowledged in the discovery phase of the case that the birthplace designation in a passport is principally used to identify American citizens abroad. It has no international diplomatic significance.

The State Department reported that between June 1996 and June 2006, it had issued 99,177 U.S. passports identifying American citizens as born in "Israel" and 52,569 passports that listed the bearer's place of birth as "Jerusalem." We asked the State Department to "describe specifically any harm to the foreign policy of the United States that would result if American citizens born in Jerusalem carried U.S. passports that showed their 'place of birth' as 'Israel.'" The answer was a long-winded response covering ten paragraphs that asserted that "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."

The State Department's response claimed that "any unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process, to bring an end to violence in Israel and the Occupied Territories, and to achieve progress on the Roadmap." We were told in this answer to our interrogatory that "the Palestinians would view any United States change with respect to Jerusalem as an endorsement of Israel's claim to Jerusalem and a rejection of their own." This could "cause irreversible damage to the credibility of the United States and its capacity to facilitate a final and permanent resolution of the Arab-Israeli conflict."

After a recitation of the few public condemnations of the 2002 law by "Palestinians from across the political spectrum" that the State Department could find, it predicted that a reversal of a "central final status issue could provoke uproar throughout the Arab and Muslim world and seriously damage our relations with friendly Arab and Islamic governments, adversely affecting relations on a range of bilateral issues, including trade and treatment of Americans abroad." Although the State Department could cite no study of the foreign-policy consequences of permitting Jerusalem-born citizens to carry passports identifying their place of birth as "Israel," the State Department stated that "such listing or designation would be interpreted as an official act of recognizing Jerusalem as being under Israeli sovereignty."

These dire predictions, however, ignore an important historical precedent. In November 1994, Congress had enacted a law concerning Taiwan that paralleled the law involved in the *Zivotofsky* case. U.S. foreign policy had, by 1994, recognized the island of Taiwan as part of the communist Republic of China. The Chinese government felt so strongly that Taiwan should not be recognized as independent in any official document that it refused to stamp Chinese visas on passports bearing "Taiwan" as a place of birth. Yet many American citizens born in Taiwan who opposed the Chinese government did not want to carry passports identifying themselves as born in the Republic of China. Congress passed a law directing the Secretary of State to comply with requests of those who wanted their passports to state that they were born in "Taiwan." Notwithstanding China's strong opposition, the State Department acquiesced in 1994 and issued an instruction to consular officers to substitute "Taiwan" for the Republic of China if requested by a citizen born in Taiwan. The instruction made clear that this was not a change in America's official policy regarding Taiwan. The State Department declared: "Although Taiwan may be listed as a place of birth in passports, the United States does not recognize Taiwan as a foreign state. The U.S. recognizes the government of the People's Republic of China as the sole legal government of China, and it acknowledges the Chinese position that there is only one China and Taiwan is part of China."

The State Department's attempt to distinguish the Taiwan precedent when we cited it in our case was incomprehensible. Its brief in the Court of Appeals said: "The State Department began listing Taiwan only after determining that doing so would be consistent with the United States' recognition that the People's Republic of China is the 'sole legal government of China' and acknowledgment of the Chinese position that 'Taiwan is a part of China.'" In fact, the 1994 statement said just the opposite – that American foreign policy did not accept Taiwan as a foreign state. The 1994 statement proves that the passport's place-of-birth identification will not be perceived as a recognition by the United States of Israeli sovereignty over all of Jerusalem.

When the *Zivotofsky* case returned to the District Court, the judge – a graduate of Harvard Law School who had many years of judicial experience – dismissed our claim a second time. As she had done years earlier, she reached her decision without even hearing oral argument. On the basis of written submissions alone, she ruled that our complaint presented a "political question" that could not be decided by a federal court. She explained, in a remarkable mis-statement of the legal issue before her, that a decision on the merits of our claim "would necessarily require the Court to decide the political status of Jerusalem."

This led to a second appeal before three different appellate judges. The case was argued in October 2008 and a decision issued in July 2009. (Menachem was then almost seven years old.) This time, two judges agreed with the lower court and affirmed her dismissal of the case because it presented a "political question." They did not share her perspective that the case required a decision on the "political status of Jerusalem," but they said that resolving the legal issue "would necessarily draw [the court] into an area of decisionmaking the Constitution leaves to the Executive alone." In other words, only the President has the authority under the Constitution to decide whether Jerusalem is part of Israel. Consequently, the courts have no business reviewing that Executive Branch decision.

A strong thirteen-page dissent on the "political question" issue came from Circuit Judge Harry Edwards, the most senior of the three judges on the appellate panel and a former Chief Judge of the Federal Court of Appeals in the District of Columbia. Judge Edwards disagreed on the justiciability of the case. He said that the constitutional question – whether the President could disobey this particular law on the ground that it infringed on his exclusive power to recognize foreign governments – could and should be decided by the court. He dismissed any argument to the contrary as "specious."

The bottom line of Judge Edwards' dissent was not, however, favorable to our claim that Congress' law should be enforced. Although he believed that the case had to be decided because the issue was not a "political question," he concluded that Congress' law was unconstitutional because it infringed Presidential authority "in furtherance of the recognition power." We petitioned for a rehearing before the full nine judges of the Court of Appeals, and three judges noted that they would grant a rehearing.

So we proceeded to the next level in America's judicial hierarchy – the Supreme Court of the United States. It has total control of its own docket and agrees to hear about 75 cases in each Term of Court of approximately 1,500 paid petitions that are filed with it. (In addition, the Court receives an equal number of requests for review each year from prisoners and others who do not print their applications and are too poor to pay the filing fee.) The Court need not state any reason for accepting or denying review of a case. (The application to the Court requests that it issue a "writ of certiorari," which is the traditional order directing that the case be brought before it.) The Justices ordinarily do not disclose how they voted at this stage of the process. All that is known is whether four of the Court's nine members voted to hear a case. If

they did, the "Order List" that is published (ordinarily on Monday mornings) says, "Certiorari Granted."

In our "Petition for a Writ of Certiorari" – our application to the Supreme Court - we presented for the Court's review only the "political question" issue and did not ask the Supreme Court to decide the ultimate constitutional question of Congress' power to disagree with any aspect of the State Department's policy affecting Jerusalem. The Supreme Court treats the "Question Presented" in an application for review very seriously and refuses to consider legal issues that are not encompassed by the questions defined in the petition.

Although the State Department filed a vigorous opposition to our request for Supreme Court review, in May 2011, the Court announced that our petition was granted. Much to our surprise, however, the Supreme Court took a step that it rarely, but occasionally, does take. It added the following directive to the announcement granting the petition for certiorari: "In addition to the question presented by the petition, the parties are directed to brief and argue the following question: 'Whether Section 214 of the [2002 law] impermissibly infringes the President's power to recognize foreign sovereigns.'" As a result the "merits" of the case, which had never before been briefed in the case's eight-year history, were briefed for the first time before the Supreme Court.

The Supreme Court's Rules limit the number of words in briefs filed with the Court. We compressed the discussion of the "political question" issue into ten pages of our brief and spent more than double that number in arguing that Congress' law was constitutional. The State Department had claimed that by directing that passports identify Jerusalem-born citizens as born in Israel, Congress was interfering with the President's "exclusive" authority to grant recognition to foreign sovereigns. No language in the United States Constitution gives the President "recognition authority," but the State Department argued that the authority given the President by Article II, Section 3 of the Constitution to "receive Ambassadors and other public Ministers" was intended to allow the President – and ***only*** the President – to grant official recognition to the government of a foreign territory. The late Professor Louis Henkin of Columbia University, a foremost expert on foreign affairs and the U.S. Constitution, noted in his treatise that the constitutional "receive ambassadors" language did not seem to be granting exclusive power to the President. It was, he said, "couched rather as a duty, an 'assignment.'"

May Congress overrule a President's "recognition" decision? Does the President have the sole authority to decide questions of foreign policy? Is an instruction that passports identify Israel as the birthplace of an American citizen born in Jerusalem who chooses to be so identified an interference with a "recognition" decision? These were some of the very interesting and important questions that had to be addressed in resolving whether Congress' 2002 law was constitutional.

The extent of the President's authority in the area of recognition of foreign governments had not been a subject of extensive scholarly research before Professor Robert Reinstein of Temple University Law School recently reviewed the historical documentation in great detail. We relied heavily on his meticulous analysis that concluded that the drafters of the Constitution never vested "a plenary recognition power . . . in the President" and that they certainly never gave the President any exclusive authority in this area. (Professor Reinstein continued researching American history that followed adoption of the Constitution, and his conclusion in an article published in 2014 supported our position even more compellingly.)

The State Department's brief in the Supreme Court presented in thirteen pages its view of the history of Congressional and Presidential involvement in "recognition authority." The brief asserted that the President has "exclusive power to recognize foreign sovereigns." Our Reply Brief cited "substantial proof to the contrary" beginning with a decision of Chief Justice John Marshall through the experiences of Presidents Monroe, Jackson, Taylor and Lincoln in recognizing newly established foreign governments. In each case, Congress participated actively in the recognition decision. We said that "Presidents who were confronted with controversial recognition issues acknowledged that action or approval by Congress was necessary before a foreign government would be formally recognized."

Oral argument before the Supreme Court was held on November 7, 2011, after Menachem had celebrated his ninth birthday. Although he had never before left Israel's borders and was reluctant to do so on this occasion, his parents persuaded him to visit Washington and listen in court as his case was presented. The photographers had a field day, and photos of Menachem and Ari striding hand-in-hand in front of the Supreme Court building (with Alyza Lewin in the background) made the front pages of newspapers in the United States and in Israel.

Lawyers who have had the heady experience of arguing before the Supreme Court (which I have done in 28 cases) say there is no comparable experience in legal practice. You have precisely 30 minutes to present your best case to the nine people who will be making the decision – an opportunity unequaled in any other presentation to an American government agency. The event is totally spontaneous and unrehearsed, and almost all your time is spent answering questions from the nine individuals

who are at the very peak of America's legal pyramid. I managed to utter 83 words before Justice Elena Kagan asked the first question: "Well, Mr. Lewin, what power is Congress exercising here?" My answer that it was exercising a power over passports was interrupted by Justice Samuel Alito, who called attention to the fact that the title and larger portion of the 2002 law concerned the obviously sensitive foreign-policy issue of moving the U.S. Embassy to Jerusalem.

Before I sat down I had fielded questions from all the Justices with the exception of Justice Clarence Thomas, who is known never to ask questions during oral argument. A light moment occurred when I argued that Congress' law did not dictate any foreign policy but merely permitted American citizens to choose how they wanted to identify their birthplace. Justice Kagan asked me whether I would not have a "better argument" along that line if a citizen could pick "Jerusalem," "Israel," or "Palestine." I replied that this was precisely what would be permitted under Congress' law because the State Department's regulation allows any person born before 1948 to choose "Palestine." Justice Kagan – then 51 years old (and the youngest justice on the Court) – responded, "Well, you have to be very old to say Palestine." Justice Ruth Ginsburg – who was then 78 (and the Court's oldest justice) – immediately interjected, "Not all that old." The audience roared with laughter.

After oral argument comes the long wait for a decision. Since the Supreme Court invariably follows the practice of deciding all argued cases before it adjourns at the end of June, we knew that a ruling would come in a few months. (Lower federal courts set no time limits for themselves, and I have been in cases in which courts have taken two years or more before issuing an opinion.) In the *Zivotofsky* case, however, the Court ruled promptly. It issued its 8-to-1 decision in an opinion by Chief Justice Roberts on March 26, 2012.

The Supreme Court held that the two judges of the Court of Appeals who had refused to rule on Menachem's claim because it was, in their view, a "political question" were wrong. Eight Justices of the Supreme Court ruled that the constitutionality of Congress' law was a standard constitutional issue and that "courts are fully capable of determining whether this statute may be given effect, or instead must be struck down in light of authority conferred on the Executive by the Constitution." Chief Justice Roberts said, "Zivotofsky does not ask the courts to determine whether Jerusalem is the capital of Israel. He instead seeks to determine whether he may vindicate his statutory right, under Section 214(d), to choose to have Israel recorded on his passport as his place of birth." He concluded, "The political question doctrine poses no bar to judicial review of the case."

The surprise, however, came after the Court decided this preliminary matter. Although it had initiated and directed the briefing and argument of the ultimate constitutional question, the Chief Justice said that resolving it was not "simple." He summarized the historical arguments of both sides and said that the Supreme Court would benefit from having those arguments considered first by the Court of Appeals. The case was sent back to that court for a decision that might "guide" the Supreme Court's ultimate decision.

So we had another round of briefs and oral argument before three different appellate judges in the Court of Appeals. I presented oral argument on March 19, 2013, and the decision was rendered on July 23, 2013, when Menachem was approaching his eleventh birthday. All three judges agreed that, in light of statements made in Supreme Court opinions that were obiter dictum (extraneous to the decision that the Court rendered), the President had exclusive authority to control foreign policy. The appellate court's opinion acknowledged that the Supreme Court had never decided a case in which the President's foreign-policy decision conflicted with that of Congress, but it said that, as "an inferior court," it did not have the authority to disagree with Supreme Court dicta. On this ground, it found Congress' law unconstitutional, because "the President exclusively holds the power to determine whether to recognize a foreign sovereign."

We then filed another petition for certiorari, asking the Supreme Court to review and reverse this latest decision in the *Zivotofsky* case. By this time, Professor Reinstein had published an article summarizing his additional historical research. He concluded that "the text, original understanding, post-ratification history, and structure of the Constitution do not support the more expansive claim that this executive power [to recognize foreign states and governments] is plenary. Under these circumstances, executive recognition decisions are not exclusive but are subject to laws enacted by Congress." We notified the Supreme Court of these scholarly findings.

The Court has agreed to hear this second round of Menachem's case, and our brief is due to be filed on July 15, 2014. We hope and pray that by his Bar Mitzva in October 2015, Menachem will be able to display an American passport describing his birthplace as "Israel."■

Nathan Lewin is a Washington, D.C., lawyer, and partner in Lewin & Lewin LLP with his daughter Alyza, who is president of the American Association of Jewish Lawyers and Jurists. Mr. Lewin is a former president of the American Section of the IAJLJ and an adjunct lecturer on Supreme Court practice at Columbia Law School.