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AJC wades into passport dispute

Jerusalem-born U.S. boy should have 'Israel' listed as birthplace, brief says

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When American citizens are born in Jerusalem, how should their U.S. passports identify their place of birth? And who has jurisdiction to decide, Congress or the State Department?

Those are the questions heading to the U.S. Supreme Court this fall in *Zivotofsky v. Secretary of State*.

Supporting the plaintiff's case is Gregory E. Ostfeld of Greenberg Traurig LLP in a friend-of-the-court brief on behalf of American Jewish Committee (AJC) of Chicago.

The case involves the family of Menachem Binyamin Zivotofsky, a U.S. citizen born on the Israeli side of Jerusalem in October 2002.

A month before Zivotofsky was born, President George W. Bush signed the Foreign Relations Authorization Act, which includes provision 214(d) stating that U.S. citizens born in Jerusalem could now list their place of birth on their passport as "Israel."

That provision counters the U.S. Department of State Foreign Affairs Manual, which says American citizens born in Jerusalem after May 14, 1948 — the date of Israel's declaration of independence — should be identified in U.S. passports as having been born in "Jerusalem" and not in "Israel," "Jordan" or "West Bank."

According to the State Department, a U.S. citizen can only have "Israel" listed as the place of birth on his or her passport if he or she was born in "Israel itself," a region that does not, the State Department writes, include the Gaza Strip, the Golan Heights, Jerusalem, the West Bank or the "no man's land" between the West Bank and Israel.

According to both the State Department and the White House, the final status of these regions must be determined by negotiations between the parties and not by the U.S.

As such, when Zivotofsky's parents requested a passport for their son listing his place of birth as "Jerusalem, Israel," they were sent passports listing his birth place as "Jerusalem."

Citing provision 214(d), the family filed a lawsuit in September 2003 in the U.S. District Court for the District of Columbia against the State Department to receive the desired passport.

A judge dismissed the complaint in September 2004, ruling that the plaintiff lacked standing and that the case presented a "non-justiciable political question" regarding the location of Jerusalem, essentially saying that the court did not want to interfere with the State Department's right of recognition.

In February 2006, the U.S. Court of Appeals for the D.C. Circuit reversed that decision, ruling that the family did have standing and ordered the district court to hear the case on its merits. In September 2007, the district court again dismissed the case — this time, strictly on the "political question" involving Jerusalem's official location.

The case returned to the federal appellate court in 2009, and the court affirmed the lower court's decision based on the political question. The family sought an en banc rehearing from the appellate court, which in June 2010 was denied.

The U.S. Supreme Court accepted the case and ruled 8-1 in March 2012 that the lower courts had jurisdiction to hear the issue and must do so prior to the high court's involvement.

Gregory E. Ostfeld

"The 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 [e]xecutive by the Constitution," U.S. Supreme Court Chief Justice John Roberts wrote in *Zivotofsky v. Clinton*.

In July 2013, the appellate court ruled that Section 214(d) of the Foreign Relations Authorization Act was an unconstitutional infringement on the president's recognition power. This fall, the U.S. Supreme Court will hear the case again, this time ruling on the constitutionality of Section 214(d).

Ostfeld got involved through Greenberg Traurig's connection with the AJC Chicago, with whom the firm has a pro bono relationship.

"Our view is that the mistake that the appellate court made was in concluding that, historically, the recognition power has been exclusively a presidential power," Ostfeld said about AJC's 34-page friend-of-the-court brief.

"If you look at the history, that's just not the case. Time after time, throughout the nation's history, Congress has asserted a role for itself in recognition decisions, and many presidents have acknowledged that role."

The earliest instance Ostfeld found in which the executive branch did not cede that recognition power to Congress was during the Lincoln administration in a matter involving the recognition of Archduke Ferdinand Maximilian as emperor of Mexico.

A more recent and relevant example, Ostfeld said, came in 1979, when the U.S. withdrew its recognition of Taiwan as a result of its relationship with the People's Republic of China. Congress enacted a law authorizing de facto diplomatic relations with Taiwan.

"One of the provisions of that law was that a United States citizen born in Taiwan can have 'Taiwan' printed as the place of birth on their passports," Ostfeld said, calling the provision a "point of critical importance."

"The other historical examples dealing with recognition involve different circumstances but clear assertions and acceptance of congressional authority in the area of recognition. And that's really the central issue in the case, is whether Congress has a role to play in recognition decisions."

The brief is the third that the AJC has filed during the history of the litigation and one of six supporting the family's side before the high court.

Representing the family is Nathan Lewin of Lewin & Lewin LLP in Washington, D.C. Representing the U.S. is Solicitor General Donald B. Verrilli Jr.

"I think there's two reasons (the brief is) important," Ostfeld said. "From the AJC's perspective, it is important to stand up for the rights of American Jews born in Jerusalem.

"And from the standpoint of the case itself, we believe this brief will be helpful to the Supreme Court on the historical and constitutional issues involved. At least we hope it will be."