Is Jerusalem in Israel? Ask the Supreme Court

The State Department says no, Congress says yes. Now the justices will decide a case involving a boy's passport.

By Akiva Shapiro

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Menachem Binyamim Zivotofsky is soon to become a bar mitzvah, but his place of birth is still in dispute.

This much is clear: He was born on Oct. 17, 2002, in Shaare Zedek Hospital, in western Jerusalem. His parents, Ari and Naomi, are U.S. citizens, which makes him a U.S. citizen as well. But when his mother visited the U.S. Embassy in Tel Aviv to apply for a passport and birth documentation for her newborn son, and listed his "place of birth" on both applications as Israel, consular officials balked.

Since 1948, successive U.S. presidents have taken the position that Jerusalem is a city without a country, pending the conclusion of Israeli-Palestinian peace talks. Under State Department policy, personal-status documents of Jerusalem-born U.S. citizens such as Mr. Zivotofsky list only the city "Jerusalem" as the passport holder's place of birth, and not Israel. That Jerusalem has, as a matter of fact, been the seat of Israel's government for almost seven decades is of no relevance to the State Department.

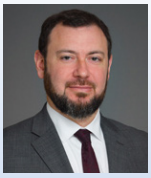
In 2002 Congress stepped in and passed a law that directs the Secretary of State to permit U.S. citizens born in Jerusalem to choose to list "Israel" as their place of birth. The purpose of the law was to provide citizens like Mr. Zivotofsky the opportunity to self-identify as being born in Israel. But Presidents Bush and Obama have refused to implement the statute, citing what they called the president's "exclusive" powers to direct the nation's foreign affairs and to recognize the boundaries of foreign powers. His parents filed a lawsuit on behalf of their child, then a year old.

Fast-forward a decade. Mr. Zivotofsky is now at the center of a skirmish between the president and Congress with profound implications for our system of checks and balances. The U.S. Supreme Court is set to hear arguments next week in *Zivotofsky v. Kerry*.

The conventional wisdom is that this is a case the plaintiff cannot win. Why should the Supreme Court honor the request of a 12-year-old boy to effectively override long-standing U.S. foreign policy on a hot-button issue—the status of Jerusalem—of international importance?

The answer is that it's not a lost cause—because Congress is on Mr. Zivotofsky's side. The law giving him the right to list "Israel" as his place of birth passed almost unanimously in both houses of Congress. The entire Senate, as well as a number of individual U.S. representatives, have submitted friend-of-the-court briefs urging the Supreme Court to enforce the law.

The right question to ask, then, is whether the executive branch is free to ignore Congress's directives whenever legislation touches on foreign affairs. Successive presidents have taken the position that it is, yet there are two major problems with this position.



Akiva Shapiro
Partner

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First, you can search the Constitution from beginning to end for an exclusive commitment of foreign-affairs authority to the president. You won't find it. To the contrary, the Constitution equips Congress with many foreign-affairs powers, including commerce with other nations, the ratification of treaties, immigration regulations and control over declarations of war. As the constitutional scholar Edwin Corwin long ago noted in his book "The President: Office and Powers, 1787-1984," the Constitution is "an invitation to struggle for the privilege of directing American foreign policy." Since the nation's founding, Congress and the president have been engaged in that fruitful and dynamic struggle. Our tripartite system does not end at our borders.

Second, the Supreme Court has repeatedly pushed back against broad assertions of exclusive executive power that, as the president urges in *Zivotofsky*, purport to negate reasonable legislation by Congress. For instance, in 1977 the court rebuffed President Nixon's challenge to a post-Watergate act of Congress that placed Nixon's papers in federal custody—to thwart their destruction. In 1988 the court rejected President Reagan's contention that restrictions Congress imposed on the removal of an independent counsel by a presidential appointee impermissibly interfered with the president's "appointments clause" powers.

The Constitution permits—and even encourages—certain kinds of intermingling between the branches of government, so long as Congress does not prevent the executive branch from "accomplishing its constitutionally assigned functions," as the Supreme Court wrote in the Nixon case. The Jerusalem passport statute Congress passed merely provides a U.S. citizen with the opportunity to self-identify as being born in Israel in that citizen's travel and personal status documents. It does not try to alter the president's position of official neutrality with respect to the status of Jerusalem. Allowing the president to wield an "absolute negative on the legislature" even where Congress has acted so modestly would, as James Madison warned in Federalist No. 51, open the door for executive powers to be "perfidiously abused."

With these principles in mind, the Supreme Court should once again reject the president's assertion of unbridled executive power and uphold the law on narrow grounds, preserving Congress's rightful role in foreign affairs. That way, guests at Mr. Zivotofsky's bar mitzvah can raise a glass not only to finally settling this young man's place of birth— but also to the outsize role he has played in preserving our system of checks and balances.

Akiva Shapiro *is a constitutional litigator at Gibson, Dunn & Crutcher in New York, and counsel to amici curiae members of Congress in Zivotofsky v. Kerry.*

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