

AGORA: REFLECTIONS ON *ZIVOTOFKSY V. KERRY*
ZIVITOFISKY AND THE POLITICS OF PASSPORTS

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In *Zivotofsky v. Kerry*,¹ the Supreme Court addressed the constitutionality of a 2002 law, Section 214(d) of the Foreign Relations Authorization Act for Fiscal Year 2003, which required consular officials to mark the word “Israel” as the birthplace of U.S. citizens who were born in Jerusalem if they requested that designation. The U.S. State Department refused to comply, pursuant to a policy of neutrality by the executive branch of the U.S. government concerning sovereignty over the much-contested city. The parents of a boy born in Jerusalem sued in federal court to see the law enforced. In its decision, the court found that Section 214(d) was an unconstitutional usurpation by Congress of the President’s exclusive authority to recognize foreign governments. The policy of official U.S. neutrality in regard to sovereignty over Jerusalem was upheld.

While I appreciate the invitation of the editors of this journal to comment on the decision, I am not a lawyer and hence am not competent to address the legal vagaries of the case. But that calls for little in the way of apology here, as the case was so thoroughly political, from start to finish.

Even as he signed the bill containing Section 214(d) in the early years of his presidency, George W. Bush issued a signing statement announcing that the provision, “if construed as mandatory rather than advisory, [might] impermissibly interfere with the President’s constitutional authority to . . . determine the terms on which recognition is given to foreign states. . . . U.S. policy regarding Jerusalem has not changed.”² President Bush thus seems to have been perfectly well aware of the trouble the clause was likely to occasion. As Justice Anthony Kennedy recounts in his majority opinion in *Zivotofsky*, many parties were not reassured by the signing statement: the Palestinian Authority formally objected, and residents of the Gaza Strip marched in protest, perceiving that the act undermined the role of the United States as an honest broker in a peace process that then, at least, still seemed a viable endeavor.

The political character of the law and of the lawsuit was also clearly recognized by the D.C. District Court that initially heard the case. That court dismissed the suit on two grounds: that the petitioner lacked standing and that the matter was a nonjusticiable “political question.” The Court of Appeals for the D.C. Circuit reversed the lower court on the issue of standing, but affirmed the lower court’s view that the case presented a political question not suitable for resolution by the courts. Although the Supreme Court vacated that judgment, finding that it was appropriate for the courts to determine the validity of Section 214(d), a great deal of the Court’s reasoning in the case rested on its political dimensions and ramifications. The whole affair recalls Alexis de

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¹ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S.Ct. 2076 (2015).

² *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, 2 PUB. PAPERS 1698 (Sep. 30, 2002).

Tocqueville's famous remark that, in the United States, "scarcely any political question arises . . . that is not resolved, sooner or later, into a judicial question."³

The Politics of Passports

Zivotofsky v. Kerry thus reminds us of the quintessentially political character of a passport. This, too, was noted in the majority's decision, by way of reference to a much earlier case involving passports. In *Urtetiqui v. D'Arcy*, the Supreme Court stated that "from its nature and object" a passport "is to be considered . . . in the character of a political document."⁴ So small and unobtrusive—as long as they are not lost or expired—passports reflect and even embody the force field of relations between states. They are a token of one's membership in a state and tell a receiving state where they should send you if they deem your presence inauspicious for any of a variety of reasons, such as political, medical, or economic. In the extreme scenario, a passport may provide grounds even for expecting that a state's military forces might become engaged to protect one's person. Or they may indicate acceptance by one state of the existence of another state, a matter of paramount importance to those wishing to be so recognized. The possibility that ISIS/ISIL/Daesh may soon begin to issue passports is seen as a step that would mark its arrival as a legitimate part of the international order.⁵

In short, passports matter in international politics, and the people who brought the *Zivotofsky* lawsuit cannot fail to have been aware of its political contentiousness when they did so. Their suit intervened in a dispute between the legislative and executive branches that has persisted for some time. In 1995, Congress took the view that the United States should recognize a united Jerusalem as Israel's capital; then, in 2002, in addition to adopting Section 214(d), Congress urged the president to take steps to move the American embassy from Tel Aviv to Jerusalem as an indication of its support for Israeli sovereignty over the city.⁶ The adjudication of the case finally came in the midst of serious tensions between the United States and Israel over a faltering Middle East peace process and between its respective leaders, Barack Obama and Binyamin Netanyahu, over an accord between the United States and Iran regarding regulation of Iran's nuclear capabilities. The court's decision reinforced the position of the United States that the status of Jerusalem must await resolution of the matter of sovereignty over the city.

All this reminds us furthermore of the shifting sands of international affairs. Seventy years ago, there was no Israel to recognize or not recognize. Today there is no Rhodesia, although immigration officers occasionally see their passports in circulation (fraudulently, of course). States, and the passports that reflect their ties with their nationals, come (mainly) and go (occasionally). There are now some 200 "nation-states" in the world, many of them products of decolonization and some, as a practical matter, with little capacity to do much for their populations or to regulate their borders. The case of South Sudan is a sad case in point; states may come into existence, and passports with them, but that does not necessarily mean they have the capability of doing much for those who are their citizens. Some argue that the so-called Westphalian system is disappearing as various entities try to shoot their way into power or to re-draw borders by force (such as ISIS in the Middle East, and Russia in Ukraine). But there remain many aspiring claimants to the status of self-governing states (including Kurds, Catalonians, Baluchis, and Tibetans), and the model is not about to dissolve any time soon. Insofar as states wish to regulate who enters and who leaves their territories, which they generally do, something like a passport system is going to remain in place for some time to come. Even in the "Schengenland" part of

³ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 110 (1835).

⁴ *Urtetiqui v. D'Arcy*, 34 U.S. 692, 699 (1835).

⁵ Tim Arango, *Building on its Brutal Origins, ISIS Steps into a Leadership Void*, INT'L N.Y. TIMES, July, 11-12, 2015.

⁶ Mark Sherman, *US Supreme Court: Jerusalem-Born Americans Can't List Israel as Birthplace*, TIMES ISR., June 8, 2015.

Europe, where passportless travel has been a possibility for two decades, people have to be able to demonstrate that they are nationals of one of the signatory countries.

Domestic Politics

These considerations further remind us that passports, in addition to reflecting the force field of international politics, also bear the imprint of internal or domestic politics. Not incorrectly, politicians see these little booklets as mechanisms for controlling the outbound movements of their own populations, if they wish to do so, as in places like China. Or they see them as a sort of “Good Housekeeping seal of approval,” facilitating entry at the point of arrival, as Italian politicians did when they adopted the passport law of 1901 in the hope of getting more of their citizens *into* the United States. Finally, as in *Zivotofsky*, the booklets may get mixed up in disputes over foreign policy objectives that have little to do with the regulation of individual mobility. Here we see what we might call the diplomatic side of the passport document, rather than the regulatory side.

At one point in the case, the 12-year-old boy at its center, Menachem Zivotofsky, announced, “I am an Israeli and I want people to know that I’m glad to be an Israeli.”⁷ However precocious, this was a manifestly tendentious statement insofar as it asserted that someone seeking a document flowing from his *American* citizenship was claiming to be something else (as well?). The young Zivotofsky could only be an Israeli by descent, as *jus soli* has little relevance in Israel, yet his parents are both American citizens who emigrated (“made *aliyah*”) to Israel in 2000. In other words, Zivotofsky was claiming to be Israeli because he had been born in a city the nationality of whose neonates is, in fact, deeply contested at best, and that, more particularly, the United States government does not formally recognize as part of Israel.

One presumes that this idea was put into his head by his parents, who brought the lawsuit as his guardians. One further presumes that they, too, were pursuing the case in order to get the United States government to affirm Jerusalem’s status as part of Israel, as the 2002 law sought to do. The Anti-Defamation League and other Jewish organizations submitted friend of the court briefs in support of the Zivotofsky’s position, seeking to advance the notion that Jerusalem is part of Israel. As with most cases of this sort, however, there was no unanimity among Jewish groups on the case; a lawyer for the American Jewish Committee stated that the group was not participating in the lawsuit because the organization believed that “all issues in the Israel-Palestinian conflict have to be settled at the negotiating table and not the U.S. Supreme Court or the UN with unilateral declarations.”⁸

In oral argument, the Zivotofsky’s lawyer, Alyza Lewin, claimed that the insertion of the word “Israel” as the birthplace of an American citizen in his or her passport would not be tantamount to recognizing Jerusalem as part of Israel. According to one account, Justice Ruth Bader Ginsburg countered that “the whole purpose of the law was to declare that Jerusalem *is* the capital of Israel.”⁹ Similarly, Justice Sonia Sotomayor described the law as an effort by Congress to direct the Secretary of State “to say something that isn’t true: ‘that someone born in Jerusalem is actually born in Israel.’”¹⁰ For the more conservative members of the Court, the issue turned on enumerated powers, but for the liberals the question was transparently political: the petitioners were trying to achieve through the courts an objective that they had been unable to realize in the political arena, namely, the official American government recognition of Jerusalem as part of Israel.

⁷ Adam B. Lerner, *Supreme Court Sides with Obama Administration in Jerusalem Passport Case*, POLITICO, 8 July 2015.

⁸ Stuart Ain, *Suit: U.S. Discriminates Against Jerusalem in Passport Dispute*, JEWISH WK. (New York), Aug. 2, 2011.

⁹ Amy Howe, *Jerusalem Passport Case Divides Court: In Plain English*, SCOTUSBLOG, (Nov. 24, 2014; 7:55 AM).

¹⁰ *Id.*

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It might be, as the petitioners argued, that this change in the birth information in passports would, in fact, have very little bearing on the Middle East situation. The lawyers for the Zivotofsky's noted that a similar change had been made in the passports of persons born in Taiwan, and that this had little effect on our relationship with the People's Republic of China, which of course regards Taiwan as part of "China." But as yet our relationship with the Chinese has had little of the volatility of our relationship with Israel and the rest of the Middle East. Previous experience had suggested to the justices in the majority that enforcement of Section 214(d) would lead to trouble, as even George W. Bush had foreseen when he signed the law.

It might be said that Congress provoked this controversy when it passed the law originally, knowing full well that it would amount to a change in the government's stance toward Israel and the Middle East peace process. As Justice Ginsburg suggested, the law essentially sought recognition by the United States of Jerusalem as the capital of Israel. The bill reflected a time when, as a prominent American politician, one could hardly go wrong "standing firm" with Israel. That now seems to have changed; the nuclear deal with Iran has clearly infuriated Israel, the American Jewish right, and our principal Muslim ally in the region, Saudi Arabia. As our reliance on Middle Eastern oil wanes, however, American political leaders may be increasingly inclined to chart a new course with regard to the Middle East, which is clearly a nettlesome region that is likely to be roiled with sectarian and other rivalries for as far as the eye can see. *Zivotofsky* fits well with that broader tendency toward more even-handed treatment of the region's quarrels.

Political through and through, *Zivotofsky* showed us once again how passports embody both domestic and international forces and diplomatic and regulatory objectives. The Court got this one right insofar as United States policy is to remain neutral regarding the status of Jerusalem, pending a final resolution of that question through negotiation. The case also recalled to mind the extent to which small, curiously marked pieces of paper, usually so innocuous, can provoke and be at the center of significant internal and interstate political conflicts.