



So, *Now* Can Menachem Zivotofsky Get His Passport Reissued to Say “Israel”?

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Does the President’s [proclamation](#) recognizing Jerusalem as the capital of Israel have any effect on what goes on the passports of U.S. citizens born there? It appears that the executive branch could change its policy to permit Jerusalem-born passport applicants to request to have their place of birth listed as Israel instead of Jerusalem. But if it does not, could Congress renew its efforts to permit U.S. citizens born in Jerusalem to identify their birth place as Israel on official documents, even though the Supreme Court earlier rebuffed these efforts? (For detailed background, see CRS Report R43773, [Zivotofsky v. Kerry: The Jerusalem Passport Case and Its Potential Implications for Congress’s Foreign Affairs Powers](#), by Jennifer K. Elsea.)

Menachem Zivotofsky, a U.S. citizen born in Jerusalem in 2002, was sufficiently interested in having his passport list Israel as his birth place that he asked the Supreme Court – [twice](#), and was denied– for assistance in compelling the State Department to comply with a [law](#) that said it had to list Israel upon request. Notwithstanding that law ([section 214\(d\) of the Foreign Relations Authorization Act for FY2003](#)), State Department policy under President George W. Bush continued to follow the longstanding practice of [directing](#) consular officers to list “Jerusalem” as the place of birth in such cases on consular reports of birth and passports. The [purpose of this policy](#) was to avoid the perception of contradicting the President’s recognition policy that conspicuously refrained from acknowledging any foreign government’s sovereign control over Jerusalem. In addition, the city’s status is a longstanding point of contention in the enduring dispute between Israel and the Palestinians. For more information, see CRS Report RL33476, [Israel: Background and U.S. Relations](#), by Jim Zanotti.

As noted, the Supreme Court denied relief. The 6-3 majority in [Zivotofsky v. Kerry determined](#) that section 214(d) impinged on the President’s exclusive authority to recognize foreign governments’ control over territory by “alter[ing] the President’s statements on matters of recognition or forc[ing] him to contradict them,” which effectively meant that Congress “would [be] exercis[ing] the recognition power.” But if filling the birthplace line on the passport of a U.S. citizen born in Jerusalem with Israel *no longer* constitutes a contradiction that impedes the nation’s ability to “speak with one voice,” would a renewed requirement to do so also be unconstitutional?

It seems counterintuitive that a newly passed provision with language identical to section 214(d) would be constitutional after the Supreme Court rejected it, but there is also language in the Court’s opinion

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suggesting this could well be the case. Section 214(d) was modeled after an earlier [provision](#) directing the State Department to list Taiwan as the place of birth of Americans born there, rather than listing China, to reflect U.S. adoption of the [One China Policy](#). The Supreme Court [did not appear to object to that provision](#) because it was in keeping with U.S. policy towards Taiwan and did not contradict an earlier presidential pronouncement regarding the recognition of Chinese sovereignty over Taiwan.

Moreover, the *Zivotofsky* majority did not object to a number of other statutes that Zivotofsky proffered to demonstrate that Congress sometimes plays a role in recognition actions. That “some Presidents have chosen to cooperate with Congress” did not, according to the [Court](#), establish that “Congress itself has exercised the recognition power.” Yet the Court did not suggest that those statutes were unconstitutional. Accordingly, a statute that does not contradict an earlier made recognition decision and does not itself constitute an exercise of the recognition power, but merely supports a presidential recognition decision, may pass constitutional muster.

It is not clear how far the President’s decision to recognize Jerusalem as Israel’s capital reaches. The President’s proclamation also stated that “[t]he specific boundaries of Israeli sovereignty in Jerusalem are subject to final status negotiations between the parties. The United States is not taking a position on boundaries or borders.” Consequently, it may be premature to presume that the President will change the passport policy, and a renewed statute to require it might still be deemed to impinge on executive authority. Shortly after the President’s proclamation on Jerusalem, [an Administration official stated](#) that “[t]here has been no change in our policy with respect to consular practice or passport issuance at this time.”

Even if the passport policy regarding Jerusalem is altered so that U.S. citizens born there may request Israel listed as their place of birth, it is likely that the change will be prospective only. The relevant State Department [Foreign Affairs Manual \(FAM\)](#) indicates that it is based on recognition policy as of the date of birth. It distinguishes how to fill the place of birth block on passports and other official documents, so that, for example, persons born before May 14, 1948 in the West Bank or Gaza may have “Palestine” listed as the place of birth (if requested). Consequently, Menachem Zivotofsky, should he ask to have his passport reissued to list “Israel” as his place of birth, would probably be unsuccessful.

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